65549

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 108.

MINNESOTA STATE LIBRARY

J. M. CERALLOS AND COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 25, 1906.

(20,763.)

(20,763.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 108.

J. M. CEBALLOS AND COMPANY, APPELLANTS,

vs.

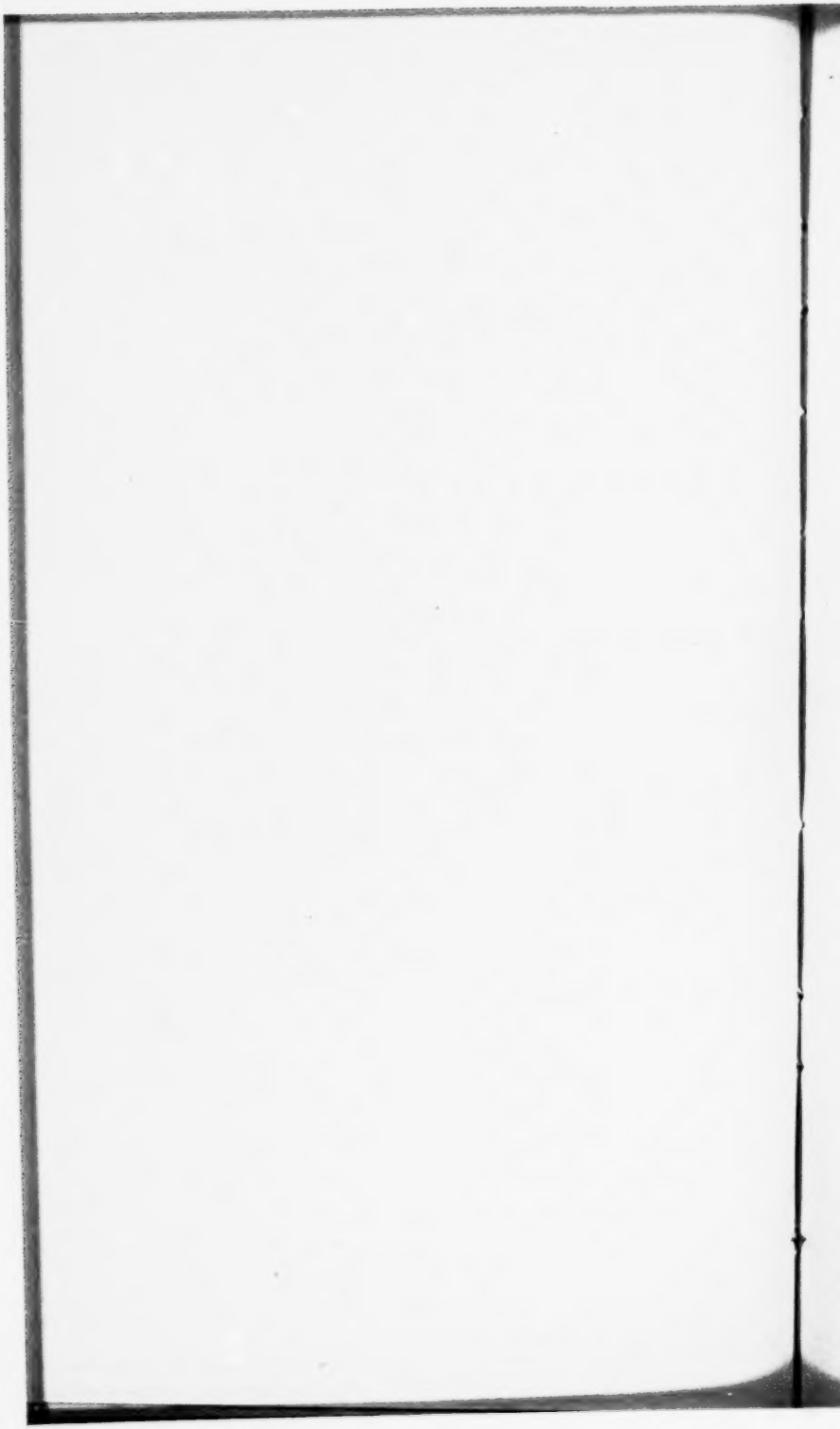
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed August 15, 1903	1	1
Amended petition, filed October 31, 1903	16	12
Counter-claims on behalf of the United States, filed June 3, 1905	31	22
Replication of claimants to counter-claims, filed September 21, 1905	34	23
Findings of fact, filed April 22, 1907	38	25
Conclusion of law	50	38
Opinion	50	38
Final judgment of the court	64	51
Application of claimants for and allowance of appeal	65	52
Certificate to record	66	52

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 24, 1908.



1 In the Court of Claims.

No. 23689.

J. M. CEBALLOS & COMPANY, a Firm Composed of Juan M. Ceballos, John S. Fiske, and Anderson C. Wilson, Petitioners,
vs.
THE UNITED STATES.

I.—*Petition.*

Filed August 15, 1903.

The petition of J. M. Ceballos & Company respectfully shows to the Court:

1st. That Juan M. Ceballos, John S. Fiske and Anderson C. Wilson compose the firm of J. M. Ceballos & Co., and under said firm name, with their principal office at 27 William Street, New York City, in the State of New York, were and are the American operators of the Spanish Transatlantic Line of steamers engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands, upon the vessels of which all the repatriated Spanish prisoners were transported from the Phillippine Islands to Spain.

The said Juan M. Ceballos and John S. Fiske are citizens of the United States by birth and the said Anderson C. Wilson is a British subject, having the right as such to sue in this Court.

2nd. That by the written terms of capitulation of the Spanish Army in the Philippine Islands made and executed between the representatives of the United States and Spanish Governments, dated the — day of ——, 1898, it was agreed by section 4 thereof
2 that "all questions relating to the repatriation of officers and men of the Spanish forces and their families and all the expense which said repatriation may occasion shall be referred to the Government of the United States at Washington."

3d. That by the Treaty of Peace made and entered into by and between the representatives of the Governments of the United States and Spain, at Paris, on December 10, 1898, it was stipulated in the first paragraph of Article Five, that "the United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article VI, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to

obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

4th. That on the 7th day of October, 1899, General Otis, Commanding the United States forces in the Philippine Islands, in accordance with the intent and terms of capitulation and the treaty as above set out, requested authority by cablegram from the Secretary of War of the United States for the sick Spanish officers, prisoners of war, to depart for Spain, in the following language to wit:

3 "MANILA, P. I., *Oct.* 7, 1898.

Adjutant General, Washington:

Request permission to allow sick Spanish officers, prisoners of war, to depart for Spain. Spanish General Commanding urgently requests.

OTIS,
Commanding."

To which the Adjutant General replied by cablegram authorizing the departure of the sick Spanish officers in the following words:

"ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., *Oct.* 7, 1898.

General Otis, Manila:

Secretary of War approves your request to allow sick Spanish officers, prisoners of war, to depart for Spain.

H. C. CORBIN,
Adj. Gen'l.

5th. On October 24, 1898, General Otis, commanding the United States forces in the Philippine Islands, requested permission of the United States authorities at Washington, through the Adjutant General of the Army, to transport to Spain sick Spanish prisoners of war by the following cablegram, to wit:

"MANILA, P. I., *October* 24, 1898.

Adjutant General, Washington:

Spanish transport ship expected to arrive to-morrow from Barcelona wishes to transport to Spain eight hundred of the eleven hundred sick Spanish prisoners of war now here. This would relieve situation. Shall permission be given?

OTIS."

To which the Adjutant General of the Army forwarded the permission of the Secretary of War in the following language, to wit:

"OCTOBER 25, 1898.

General Otis, Manila:

Secretary of War approves sending sick Spanish prisoners
4 to Spain. Let them go when co-venient opportunity offers.

H. C. CORBIN,
Adjutant General."

6th. On January 20, 1899, R. A. C. Smith, attorney-in-fact for J. M. Ceballos & Company, petitioners herein, requested the Honorable R. A. Alger, Secretary of War of the United States, to authorize the transportation of a number of prisoners of war from Manila, Philippine Islands, to Spain in the following telegram, to wit:

"NEW YORK CITY, *January 20th,* 1899.

Hon. R. A. Alger, Secretary of War, Washington, D. C.:

Would respectfully suggest that inasmuch as the Spanish Trans-Atlantic Steamship Company has now in Manila ready to sail for Spain one of its large steamers, fitted out as transport, permission be given them to bring home whatever number of prisoners of war from Manila to Spain, the steamer can carry conveniently. The price of the service to be the same as you may contract for under the proposals which have been invited for February 1st. From the manner in which the Trans-Atlantic Line can carry out this service, I am satisfied that if they are the successful bidders on February 1st, every prisoner of war will be out of Manila by March 20th.

R. A. C. SMITH.

2:02 p. m."

And the Honorable R. A. Alger, Secretary of War of the United States, directed the return of the Spanish prisoners in the following telegram to General Otis, Commanding the United States forces in the Philippine Islands, to wit:

"JANUARY 21, 1899.

To General Otis, Manila:

Bids are asked for sending Spanish prisoners to Spain.
5 In the meantime, load the Trans-Atlantic Steamship Company's ship now in Manila, terms to be settled when bids are opened. Count prisoners as they go aboard and report. Are there any other ships available?

ALGER, *Secretary.*"

And the Honorable Secretary of War replied to the telegram of said R. A. C. Smith as follows, to wit:

"JANUARY 21, 1899.

Hon. R. A. C. Smith, 100 Broadway, New York City:

Have cabled General Otis to load ship you mention on the terms mentioned by you, with Spanish prisoners.

(Signed) R. A. ALGER,
Secretary of War."

7th. That on January 20, 1899, the United States, by M. I. Ludington, Quartermaster-General of the Army, advertised for bids for transportation of Spanish prisoners of war from the Philippine Islands to Cadiz, or such other ports of Spain as might thereafter be designated, stating that cabin accommodations should be supplied for the officers, and third class, or steerage accommodations, for the enlisted men. Said advertisement being in the following form, to wit:

"WAR DEPARTMENT,
QUARTERMASTER-GENERAL'S OFFICE,
WASHINGTON, D. C., *January 20th*, 1899.

Transportation for Spanish Prisoners of War from the Philippine Islands to Spain.

By direction of the Secretary of War, sealed proposals are invited for the transportation of the Spanish prisoners of war now in the Philippine Islands from Manilla or such other ports in the Philippine Islands as may be most convenient for their embarkation to Cadiz or such other ports of Spain as may hereafter be designated. Their number is estimated as about 16,000 officers and enlisted men. Cabin accommodations are to be supplied for the officers and third class or steerage accommodations, having suitable galley accommodations, conforming to the United States re-
6 quirements as to space and ventilation, for the enlisted men. The United States Government will deliver the prisoners on board the vessels at Manila, or such other ports as may be designated for their embarkation. Proposals will state the price per capita for transporting officers and for transporting enlisted men and for their subsistence and delivering them on shore at the Spanish port, or ports, to be designated, and will be accompanied by a guarantee that the prisoners will be comfortably cared for and subsisted while on the journey. The subsistence to be equal to the United States 'garrison' rations, as follows: One thousand complete rations. Meat—Pork, 1-10, 75 pounds net weight; bacon, 2-10, 150 pounds net weight; tinned roast beef, 7-10, 700 net weight. Flour or hard-bread, net weight 1,000 pounds. Vegetables—Dried beans, net weight 75 pounds, or rye, net weight 50 pounds; fresh potatoes, net weight 800 pounds; onions, net weight 200 pounds. Coffee, roasted, net weight 80 pounds. Soap, net weight 40 pounds. Salt, net weight 40 pounds. Pepper, black, net weight 25 pounds. Proposals will state the number of vessels which are proposed to be used for the service; the name and classification of each; the tonnage capacity of each; their speed; the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage from Manila to the coast of Spain. Proposals will also state the time at which each vessel will arrive in the harbor of Manila and report to the chief Quartermaster at that place ready for the embarkation of the prisoners of war. Vessels of any nationality may be tendered and will be considered for the service required. Payment for the service will be made when evidence is furnished that the ship has arrived

with her passengers at point of destination. The number of officers and men counted on board at place of embarkation by the Quartermaster is to determine the number to be paid for. Proposals should be addressed to the Depot Quartermaster, San Francisco, California, at which place they will be opened at 12 o'clock M., standard time, on the 1st day of February, 1899, and submitted to this office. The Government reserves the right to reject any and all proposals submitted.

M. I. LUDINGTON,
Quartermaster-General, U. S. Army."

7 8th. That the petitioners, J. M. Ceballos & Company, through R. A. Smith, their attorney in fact, in compliance with said advertisement, submitted in due form of law a bid for the transportation of said Spanish prisoners, and in the form following, to wit:

"SIR: In accordance with the advertisement of General M. I. Ludington, Quartermaster-General, U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Co., Agents of the Compania Transatlantica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain. (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

It is proposed not to load the steamers beyond two-thirds of their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary owing to climatic conditions and length of voyage.

I further propose to call at any port of the Philippine Islands that the U. S. Government may designate, provided the vessels can safely lay afloat.

The charge for this service is dependent on the ports of call in the Philippines and also on the quarantine regulations in Spain, but I propose and hereby agree to do this service at a price not to exceed in any case:

for each officer..... $215.00;
for each enlisted man..... 73.75.

It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

I will furnish a satisfactory bond for the faithful fulfillment of this service.

Very respectfully,
(Signed) R. A. C. SMITH."

8 And to said bid or proposal was attached a list containing the name and classification of each vessel, its tonnage capacity and all other information required as to said vessels by the advertisement for bids as aforesaid. And the said petitioners having been duly and legally awarded the contract for the transportation of the said prisoners in accordance with the advertisement and their bid as above set out, through their attorney-in-fact R. A. C. Smith, entered into a written contract on the 4th day of March, A. D. 1899, with the United States, through the Honorable R. A. Alger, Secretary of War, for the transportation, subsistence and landing of the said Spanish prisoners upon certain fixed terms, which said contract is in the words following, to wit:

"Whereas under the terms of the Treaty of Peace entered into by and between the representatives of the Government of the United States and of Spain, signed at Paris, on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of Article V, that

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article VI, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

9 And whereas, sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Cabellos and Company, of New York, having been duly accepted by the Secretary of War of the United States,

Therefore this Article of Agreement is made and entered into this 4th day of March, 1899, by and between the Secretary of War and the said J. M. Ceballos and Company, for the transportation of the said prisoners of war, from the Philippine Islands to Spain, as are designated in the terms of the Treaty of Peace, referred to and quoted herein.

The said J. M. Ceballos and Company hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from

the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.

The said Company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men and other persons on board each ship; that the subsistence furnished by the Company shall be equal in every respect to the United States Army garrison rations.

The Company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the prisoners of war and other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the Company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

10 In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos and Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen — ($215.00) and for each enlisted man, private soldier or other person designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men or persons have been transported, subsisted, and delivered on shore in Spain.

It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers to be paid by the United States at the rate of fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and forty cents for each enlisted man per day. An account of the number of officers, enlisted men or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company and payment to the said Company shall be made upon the basis of the number of officers, enlisted men and persons counted on each ship.

It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Phil-

ippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States,
11 is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

In witness whereof, we hereunto set our hands and seals this 4th day of March, A. D. 1899.

(Sgd.) R. A. ALGER, [SEAL.]
Sec'ty of War.
" J. M. CEBALLOS & CO., [SEAL.]
By R. A. C. SMITH, *Attorney-in-Fact.*

Witnesses:

(Sgd.) G. D. H. HOPKINS,
As to R. A. A.
" L. F. RANDOLPH.

9th. That under the aforesaid terms of capitulation of the Spanish forces in the Philippine Islands and of the Treaty of Paris of December 10, 1898, a public exigency existed such as to require the repatriation of large numbers of the Spanish prisoners before bids for their transportation could be advertised for and a formal contract made, and in compliance with the several propositions by telegraph and cable and the replies thereto, as above set out, relating to the repatriation of the Spanish prisoners in the Philippine Islands, and also in accordance with various other agreements made between the United States, through the Secretary of War, and the petitioners, through their attorney-in-fact R. A. C. Smith, as well as under the formal contract of March 4, 1899, hereinbefore set forth at length, the said J. M. Ceballos and Company, petitioners herein, between November 8, 1898, and July 14, 1901, inclusive, transported, subsisted and landed in Spain the following numbers and classes of prisoners as designated by the United States officers, authorized and appointed to such duty, to wit:

(*a.*) Three thousand four hundred and forty-five persons transported, subsisted and landed as first-class or cabin passengers at two hundred and fifteen dollars ($215) each, aggregating $740,675.00

12

(*b.*) Four hundred and fifteen persons, minor children of the above, transported, subsisted and landed as first-class or cabin passengers at one hundred and seven dollars and fifty cents ($107.50) each (½ full rate) aggregating.. 44,612.50

(*c.*) Thirteen thousand six hundred and forty-seven persons transported, subsisted and landed as third-class or steerage passengers at seventy-three dollars and seventy-five cents ($73.75) each, aggregating.....	$1,006,466.25
(*d.*) Twenty persons, minor children of those last named above, transported, subsisted and landed as third-class or steerage passengers at thirty-six dollars and eighty-seven and one-half cents ($36.875) (½ third-class rate), aggregating	737.50
Total persons 17,527. Total charge...	$1,792,491.25

Making the whole number of persons so transported, subsisted and landed in Spain, designated and classified by United States officers as above set out, seventeen thousand five hundred and twenty-seven, being all the persons required to be transported, for which the United States under the several agreements aforesaid promised and agreed to pay the petitioners at the rates and for the classes of transportation as above set forth, the aggregate sum of one million seven hundred and ninety-two thousand four hundred and ninety-one dollars and twenty-five cents ($1,792,491.25).

10th. That the Government of the United States has paid to your petitioners from time to time various sums of money on the dates named as follows, to wit:

13 PAYMENTS.

Sundry Checks Received by J. M. Ceballos & Co.—Payments on a/c by United States Government.

	Officers.	Enlisted men.	Women and major children.	Minor children.	Civil officials.	Warrants.	
June 20/99...	1019	7067	.....	.....	.....	$666,248.63	($74,027.62, 10% retained by Gov't).
Nov. 28/99...	131	1198	.....	.....	.....	190,545.12	(inc. previous 10% as above).
July 30/1900.	288	3728	1302	406	.....	447,853.75	
Oct. 6/1900.	148	1425	53	.....	.....	140,822.50	
April 11/1902.	.....	.....	.....	.....	393	28,983.75	
April 21/1902.	.....	.....	.....	.....	.....	9,746.25	(315 Civ.)
July 3/1902.	.....	.....	.....	.....	.....	34,747.50	(Off. @ $141.25, diff. bet. 1st & 3rd class.)
Oct. 31/1902.	.....	16	.....	.....	.....	1,180.00	
	.....	19	.....	.....	.....	1,401.25	
Nov. 3/1902.	.....	6	.....	.....	.....	442.50	
	1	4	.....	.....	.....	510.00	
	1	.....	.....	.....	.....	215.00	
	.....	10	.....	.....	.....	737.50	
	.....	1	.....	.....	.....	73.75	
Nov. 3, rec'd & ret'd.	8	17	6	.....	.....	3,416.25	
Feb. 26/3, deposited.....	1	1	2	.....	.....	436.25	
	5	91	.....	.....	.....	7,786.25	
	9	.....	.....	.....	.....	1,935.00	
	.....	.....	12	.....	18	4,755.00	
M'ch 7/1903,	.....	.....	8	.....	2	1,020.00	
Sup. Bill No.	.....	.....	9	.....	3	1,308.75	
22.....	.....	.....	1	.....	.....	73.75	
	2	less not	1 all'd.	.....	.....	356.25	
Totals..	1613	13583	1392	406	416	$1,544,595.00	

Being 1,613 officers, 338 civil officials @ $215 each; 13,583
14 enlisted men, 1,392 wives and major children, 78 officers @ $73.75 each; 406 minor children @ $36.875 each, making in the aggrega e $1,544,595, and leaving due now to your petitioner under said contracts the sum of $247,896.25.

11th. That while no difference of rate or charge was made in the contracts above set out between adults and minor children transported the petitioners nevertheless following the usual custom in the carrying of passengers by sea, have charged only one-half rate for the children under — (10) years of age, so that the charge for 415 such children of officers is $107.50 each and for twenty (20) such chil-

dren of enlisted men $36.75 each, being in both cases one-half the rate for adults of each class so transported.

12th. That the full original claim has been presented to the War Department of the United States and the several amounts above specified in paragraph 10 have been paid in part of said claim, but the balance has not been paid, and as petitioners are informed, because it is claimed by the United States that as to all transports sailing between February 20, 1900, and July 14, 1901, inclusive, payment can be made only for the number of persons specified in the requisition of the Quartermaster at Manila and not for the number actually transported, subsisted and landed, and also because it is further claimed that the wives and children of officers and officials, although transported and subsisted as first-class passengers and furnished cabin accommodations shall be paid for at only third-class rates.

13th. That neither said claim nor any part thereof, or any interest therein, has been assigned or made over to any other person; that the said petitioners are justly entitled to the amount herein claimed from the United States after allowing all just claims and set-
15 offs. And the amount claimed, to wit: $247,896.25 has been lost to the petitioners by the failure of the United States, its officers and agents to carry out and perform the contracts as above set out. That said claim for two hundred and forty-seven thousand eight hundred ninety-six dollars and twenty-five cents ($247,896.25) has never been presented to or acted on by Congress.

Wherefore your petitioners demand judgment against the United States for ($247,896.25) two hundred and forty-seven thousand eight hundred and ninety-six dollars and twenty-five cents.

JOHN J. HEMPHILL,
Att'y for Petitioner.

S. C. NEALE,
EDWIN H. DUFF,
Of Counsel.

STATE OF NEW YORK, *City and County of New York, ss:*

Personally appears John S. Fiske and makes oath and says that he is a member of the firm of J. M. Ceballos & Co., the petitioners herein; that the statements set forth in the above petition of his own knowledge are true, and those stated upon information and belief he believes to be true.

JOHN S. FISKE.

Sworn to and signed before me this 13th day of August, 1903.

[SEAL.] GEO. L. STRONG,
Notary Public, New York County.

16 Petition No. 23689.

J. M. CEBALLOS & COMPANY, a Firm Composed of Juan M. Ceballos, John S. Fiske, and Anderson C. Wilson, Petitioners,

vs.

THE UNITED STATES, Defendants.

II.—*Amended Petition.*

Filed August 15, 1903.

Amended Petition Filed October 31, 1903.

The amended petition of J. M. Ceballos & Company respectfully shows to the Court:

1st. That Juan M. Ceballos, John S. Fiske and Anderson C. Wilson compose the firm of J. M. Ceballos & Co., and under said firm name, with their principal office at 27 William Street, New York City, in the State of New York, were and are the American operators of the Spanish Transatlantic Line of steamers engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands, upon the vessels of which all the rapatriated Spanish prisoners were transported from the Philippine Islands to Spain.

The said Juan M. Ceballos and John S. Fiske are citizens of the United States by birth and the said Anderson C. Wilson is a British subject, having the right as such to sue in this Court.

2nd. That by the written terms of capitulation of the
17 Spaninsh Army in the Philippine Islands made and executed between the representatives of the United States and Spanish Governments, dated the 14th day of August, 1898, it was agreed by section 4 thereof that "all questions relating to the repatriation of officers and men of the Spanish forces and their families and all the expense which said repatriation may occasion shall be referred to the Government of the United States at Washington."

3rd. That by the Treaty of Peace made and entered into by and between the representatives of the Governments of the United States and Spain, at Paris, on December 10, 1898, it was stipulated in the first paragraph of Article Five, that "the United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article VI, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

4th. That on the 7th day of October, 1898, General Otis, Commanding the United States forces in the Philippine Islands,
18 in accordance with the intent and terms of capitulation and the treaty as above set out, requested authority by cablegram from the Secretary of War of the United States for the sick Spanish officers, prisoners of war, to depart for Spain, in the following language, to wit:

"MANILA, P. I., *Oct.* 7, 1898.

Adjutant General, Washington:

Request permission to allow sick Spanish officers, prisoners of war, to depart for Spain. Spanish General Commanding urgently requests.

OTIS,
Commanding."

To which the Adjutant General replied by cablegram authorizing the departure of the sick Spanish officers in the following words:

"ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., *Oct.* 7, 1898.

General Otis, Manila:

Secretary of War approves your request to allow sick Spanish officers, prisoners of war, to depart for Spain.

H. C. CORBIN,
Adj. Gen'l."

5th. On October 24, 1898, General Otis, commanding the United States forces in the Philippine Islands, requested permission of the United States authorities at Washington, through the Adjutant General of the Army, to transport to Spain sick Spanish prisoners of war by the following cablegram, to wit:

"MANILA, P. I., *October* 24, 1898.

Adjutant General, Washington:

Spanish transport ship expected to arrive to-morrow from Barcelona wishes to transport to Spain eight hundred of the eleven hundred sick Spanish prisoners of war now here. This would relieve situation. Shall permission be given?

OTIS."

19 To which the Adjutant General of the Army forwarded the permission of the Secretary of War in the following language, to wit:

"OCTOBER 25, 1898.

General Otis, Manila:

Secretary of War approves sending sick Spanish prisoners to Spain. Let them go when convenient opportunity offers.

H. C. CORBIN,
Adjutant General."

6th. On January 20, 1899, R. A. C. Smith, attorney-in-fact for J. M. Ceballos & Company, petitioners herein, requested the Honorable R. A. Alger, Secretary of War of the United States, to authorize the transportation of a number of prisoners of war from Manila, Philippine Islands, to Spain in the following telegram, to wit:

"NEW YORK CITY, *January 20th*, 1899.

Hon. R. A. Alger, Secretary of War, Washington, D. C.:

Would respectfully suggest that inasmuch as the Spanish Trans-Atlantic Steamship Company has now in Manila ready to sail for Spain one of its large steamers, fitted out as transport, permission be given them to bring home whatever number of prisoners of war from Manila to Spain, the steamer can carry conveniently. The price of the service to be the same as you may contract for under the proposals which have been invited for February 1st. From the manner in which the Trans-Atlantic Line can carry out this service, I am satisfied that if they are the successful bidders on February 1st, every prisoner of war will be out of Manila by March 20th.

R. A. C. SMITH.

2.02 p. m."

20 And the Honorable R. A. Alger, Secretary of War of the United States, directed the return of the Spanish prisoners in the following telegram to General Otis, Commanding the United States forces in the Philippine Islands, to wit:

"JANUARY 21, 1899.

To General Otis, Manila:

Bids are asked for sending Spanish prisoners to Spain. In the meantime, load the Trans-Atlantic Steamship Company's ship now in Manila, terms to be settled when bids are opened. Count prisoners as they go aboard and report. Are there any other ships available?

ALGER, *Secretary.*"

And the Honorable Secretary of War replied to the telegram of said R. A. C. Smith as follows, to wit:

"JANUARY 21, 1899.

Hon. R. A. C. Smith, 100 Broadway, New York City:

Have cabled General Otis to load ship you mention on the terms mentioned by you, with Spanish prisoners.

(Signed) R. A. ALGER,
Secretary of War."

7th. That on January 20, 1899, the United States, by M. I. Ludington, Quartermaster-General of the Army, advertised for bids for transportation of Spanish prisoners of war from the Philippine Islands to Cadiz, or such other ports of Spain as might thereafter be designated, stating that cabin accommodations should be supplied for the officers, and third-class or steerage accommodations,
21 for the enlisted men. Said advertisement being in the following form, to wit:

"WAR DEPARTMENT,
QUARTERMASTER-GENERAL'S OFFICE,
WASHINGTON, D. C., *January 20th*, 1899.

Transportation for Spanish Prisoners of War from the Philippine Islands to Spain.

By direction of the Secretary of War, sealed proposals are invited for the transportation of the Spanish prisoners of war now in the Philippine Islands from Manila or such other ports in the Philippine Islands as may be most convenient for their embarkation to Cadiz or such other ports of Spain as may hereafter be designated. Their number is estimated as about 16,000 officers and enlisted men. Cabin accommodations are to be supplied for the officers and third class or steerage accommodations, having suitable galley accommodations, conforming to the United States requirements as to space and ventilation, for the enlisted men. The United States Government will deliver the prisoners on board the vessels at Manila, or such other ports as may be designated for their embarkation. Proposals will state the price per capita for transporting officers and for transporting enlisted men and for their subsistence and delivering them on shore at the Spanish port, or ports, to be designated, and will be accompanied by a guarantee that the prisoners will be comfortably cared for and subsisted while on the journey. The subsistence to be equal to the United States 'garrison' rations, as follows: One thousand complete rations. Meat—Pork, 1-10, 75 pounds net weight; bacon, 2-10, 150 pounds net weight; tinned roast beef, 7-10, 700 net weight. Flour or hard bread, net weight 1,000 pounds. Vegetables—Dried beans, net weight 75 pounds, or rye, net weight 50 pounds; fresh potatoes, net weight 800 pounds; onions, net weight 200 pounds. Coffee, roasted, net weight 80 pounds. Soap, net weight 40 pounds. Salt, net weight 40 pounds. Pepper, black, net weight 25 pounds. Proposals will state the number of vessels which are proposed to be used for the service; the name and classification of each; the tonnage capacity of each; their speed; the berth
22 accommodations upon each, and the approximate length of time required by each vessel to make the voyage from Manila to the coast of Spain. Proposals will also state the time at which each vessel will arrive in the harbor of Manila and report to the chief Quartermaster at that place ready for the embarkation of the prisoners of war. Vessels of any nationality may be tendered and will be considered for the service required. Payment for the service will be made when evidence is furnished that the ship has arrived

with her passengers at point of destination. The number of officers and men counted aboard at place of embarkation by the Quartermaster is to determine the number to be paid for. Proposals should be addressed to the Depot Quartermaster, San Francisco, California, at which place they will be opened at 12 o'clock M., standard time, on the 1st day of February, 1899, and submitted to this office. The Government reserves the right to reject any and all proposals submitted.

M. I. LUDINGTON,
Quartermaster-General, U. S. Army.".

8th. That the petitioners, J. M. Ceballos & Company, through R. A. C. Smith, their attorney-in-fact, in compliance with said advertisement, submitted in due form of law a bid for the transportation of said Spanish prisoners, and in the form following, to wit:

"SIR: In accordance with the advertisement of General M. I. Ludington, Quartermaster-General U. S. Army, copy of which is hereto attached, I propose, on behalf of Messers. J. M. Ceballos & Co., Agents of the Compania Transatlantica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain.
23 (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

It is proposed not to load the steamers beyond two-thirds of their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary owing to climatic conditions and length of voyage.

I further propose to call at any port of the Philippine Islands that the U. S. Government may designate, provided the vessels can safely lay afloat.

The charge for this service is dependent on the ports of call in the Philippines and also on the quarantine regulations in Spain, but I propose and hereby agree to do this service at a price not to exceed in any case:

for each officer..... $215.00;
for each enlisted man..... 73.75.

It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

I will furnish a satisfactory bond for the faithful fulfillment of this service. Very respectfuliy,

(Signed) R. A. C. SMITH."

And to said bid or proposal was attached a list containing the name and classification of each vessel, its tonnage capacity and all other information required as to said vessels by the advertisement for bids as aforesaid. And the said petitioners having been duly and legally awarded the contract for the transportation of the said prisoners in accordance with the advertisement and their bid as above set out, through their attorney-in-fact R. A. C. Smith, entered into a written contract on the 4th day of March, A. D. 1899, with the United States, through the Honorable R. A. Alger, Secretary of War, for the transportation, subsistence and landing of the said Spanish prisoners upon certain fixed terms, which said contract is in the words following, to wit:

"Whereas under the terms of the Treaty of Peace entered into by and between the representatives of the Government of the United States and of Spain, signed at Paris, on December 10, 1898,
24 it is mutually agreed and stipulated in the first paragraph of Article V, that

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article VI, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

And whereas, sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Cabellos and Company, of New York, having been duly accepted by the Secretary of War of the United States,

Therefore this Article of Agreement is made and entered into this 4th day of March, 1899, by and between the Secretary of War and the said J. M. Ceballos and Company, for the transportation of the said prisoners of war, from the Philippine Islands to Spain, as are designated in the terms of the Treaty of Peace, referred to and quoted herein.

The said J. M. Ceballos and Company hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by

the Secretary of War, and to furnish to them subsistence while en-
route and on board the ships, and to deliver them on shore in Spain.

The said Company further agrees that for the purpose
25 herein stipulated they will provide a sufficient number of
steamships for the safe and comfortable transportation of
the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men and other persons on board each ship; that the subsistence furnished by the Company shall be equal in every respect to the United States Army garrison rations.

The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the prisoners of war and other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the Company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos and Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215.00) and for each enlisted man, private soldier or other person designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men or persons have been transported, subsisted, and delivered on shore in Spain.

It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any,
earned by any such steamer or steamers to be paid by the
26 United States at the rate of fifteen cents (15c.) per gross ton
register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and forty cents for each enlisted man per day. An account of the number of officers, enlisted men or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company and payment to the said Company shall be made upon the basis of the number of officers, enlisted men and persons counted on each ship.

It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-

four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

No member or delegate to Congress nor any person belonging to, or employed in, the miltary service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

In witness whereof, we hereunto set our hands and seals this 4th day of March, A. D. 1899.

(Sgd.) R. A. ALGER, [SEAL.]
Sec't'y of War.

" J. M. CEBALLOS & CO., [SEAL.]
By R. A. C. SMITH, *Attorney-in-fact.*

Witnesses:

(Sgd.) G. D. H. HOPKINS,
As to R. A. A.

" L. F. RANDOLPH.

9th. That under the aforesaid terms of capitulation of the Spanish forces in the Philippine Islands and of the treaty of Paris of December 10, 1898, a public exigency existed such as to require the repatriation of large numbers of the Spanish prisoners before bids for their transportation could be advertised for and a formal contract
27 made, and in compliance with the several propositions by telegraph and cable with the replies thereto, as above set out, relating to the repatriation of the Spanish prisoners in the Philippine Islands, and also in accordance with various other agreements made between the United States, through the Secretary of War, and the petitioners, through their attorney-in-fact R. A. C. Smith, as well as under the formal contract of March 4, 1899, hereinbefore set forth at length, the said J. M. Ceballos and Company, petitioners herein, between November 8, 1898, and August —, 1901, inclusive, transported, subsisted and landed in Spain the following numbers and classes of prisoners as designated and classified by the United States officers, authorized and appointed to such duty, to wit:

(*a*) Three thousand eight hundred and sixty persons transported, subsisted and landed as first-class or cabin passengers at two hundred and fifteen ($215) dollars each, aggregating.	$829,900.00
(*b*) Thirteen thousand six hundred and sixty-seven persons transported, subsisted and landed as third-class or steerage passengers at seventy-three dollars and seventy-five cents ($73.75) each, aggregating	1,007,941.25
Total persons, 17,527. Total charge.....	$1,837,841.25

Making the whole number of persons so transported, subsisted and landed in Spain, designated and classified by United States officers as above set out, seventeen thousand five hundred and twenty-seven,

being all the persons required to be transported, for which the United States under the several agreements aforesaid promised and agreed to pay the petitioners at the rates and for the classes of transportation as above set forth, the aggregate sum of one million eight hundred and thirty-seven thousand eight hundred and forty-one dollars and twenty-five cents ($1,837,841.25).

That the rates agreed upon and charged as above set forth, for the services rendered, were reasonable, fair and just.

28 10th. That the Government of the United States has paid to your petitioners from time to time various sums of money on the dates named as follows, to wit:

PAYMENTS.

Sundry Checks Received by J. M. Ceballos & Co.—Payments on a/c by United States Government.

	Officers.	Enlisted men.	Women and major children.	Minor children.	Civil officials.	Warrants.	
June 20/99...	1019	7067	.....	.....	.....	$666,248.63	($74,027.62, 10% retained by Gov't).
Nov. 28/99...	131	1198	.....	.....	.....	190,545.12	(inc. previous 10% as above).
July 30/1900.	288	3728	1302	406	.....	447,853.75	
Oct. 6/1900.	148	1425	53	.....	.....	140,822.50	
April 11/1902.	.....	.....	.....	.....	393	28,983.75	
April 21/1902.	.....	.....	.....	.....	.....	9,746.25	(315 Civ.)
July 3/1902.	.....	.....	.....	.....	.....	34,747.50	(Off. @ $141.25, diff. bet. 1st & 3rd class.)
Oct. 31/1902.	.....	16	.....	.....	.....	1,180.00	
	.....	19	.....	.....	.....	1,401.25	
Nov. 3/1902.	.....	6	.....	.....	.....	442.50	
	1	4	.....	.....	.....	510.00	
	1	.....	.....	.....	.....	215.00	
	.....	10	.....	.....	.....	737.50	
	.....	1	.....	.....	.....	73.75	
Nov. 3, rec'd & ret'd.	8	17	6	.....	.....	3,416.25	
Feb. 26/3, deposited.....	1	1	2	.....	.....	436.25	
M'ch 7/1903, Sup. Bill No. 22.....	5	91	.....	.....	.....	7,786.25	
	9	.....	.....	.....	.....	1,935.00	
	.....	.....	12	.....	18	4,755.00	
	.....	.....	8	.....	2	1,020.00	
	.....	.....	9	.....	3	1,308.75	
	.....	.....	1	.....	.....	73.75	
	2	less not	1 all'd.	.....	.....	356.25	
Totals..	1613	13583	1392	406	416	$1,544,595.00	

Being 1,613 officers, 338 civil officials @ $215 each; 13,583 enlisted men, 1,392 wives and major children, 78 officers @ $73.75 each; 406 minor children @ $36.875 each, making in the aggregate $1,544,595, and leaving due now to your petitioners under said contracts the sum of $293,246.25.

11th. That the full original claim has been presented to the War Department of the United States and the several amounts above specified in paragraph 10 have been paid in part of said claim, but the balance has not been paid, and as petitioners are informed, because it is claimed by the United States that as to all transports sailing between February 20, 1900, and July 14, 1901, inclusive, payment can be made only for the number of persons specified in the requisition of the Quartermaster at Manila and not for the number actually transported, subsisted and landed, and also because it is further claimed that the wives and children of officers and officials, although transported and subsisted as first-class passengers and furnished cabin accommodations shall be paid for at only third-class rates.

12th. That neither said claim nor any part thereof, or any interest therein, has been assigned or made over to any other person; that the said Juan M. Ceballos and John S. Fiske ,the petitioners, have at all times borne true allegiance to the Government of the United States, and neither of the three petitioners first above named has in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and they believe the facts as stated in said petition to be true; that the said petitioners are justly entitled to the amount herein claimed from the United States after allowing all just claims and set-offs. And the amount claimed, to wit: $293,246.25 has been lost to the petitioners by the failure of the United States, its officers and agents, to carry out and perform the contracts as above set out. That said claim for two hundred and ninety-three thousand two hundred and forty-six dollars and twenty-five cents ($293,246.25) has never been presented to or acted on by Congress.

Wherefore your petitioners demand judgment against the United States for two hundred and ninety-three thousand two hundred and forty-six dollars and twenty-five cents ($293,246.25).

JOHN J. HEMPHILL,
Att'y for Petitioner.

S. C. NEALE,
EDWIN H. DUFF,
Of Counsel.

DISTRICT OF COLUMBIA, *City of Washington, To wit:*

Personally appeared John J. Hemphill and under oath declared that he is the attorney of record in this case; that he has carefully read the foregoing amended petition, and that the statements therein set forth of his own knowledge are true, and those stated upon information and belief he believes to be true.

JOHN J. HEMPHILL.

Subscribed and sworn to before me this 30th day of October, 1903.

[SEAL.] EMORY H. BOGLEY,
Notary Public.

31 No. 23689.

J. M. CEBALLOS & CO.
v.
THE UNITED STATES.

III. *Counterclaim on Behalf of the United States.*

Filed June 3, 1905.

Comes now the United States, by its Attorney-General, and, further answering the petition of claimant heretofore filed herein and for counterclaim thereto, states as follows:

First. That the claimant herein is indebted to the United States in the sum of $371,988.75 for moneys paid to claimants by the United States on account of the first five shipments of Spanish prisoners of war from the Philippine Islands, consisting of civil and military officers, enlisted men, minor children, and others in the vessels of the claimant company, the dates of sailing of said vessels being November 7, December 13, and December 21, 1898, and January 1 and January 17, 1899; said amount having been paid to said claimant company on account of said shipments without authority of law prior to the execution of any contract, express or implied, between the United States and the claimant company or anyone in its behalf.

32 Second. Further answering said petition and for a second counterclaim, the defendant states as follows:

That the claimant is indebted to the United States in the sum of $12,788.75 for moneys unlawfully paid the claimant company by the United States for transportation of prisoners of war and others who were shipped in the vessels of the claimant company from the Philippine Islands upon various dates, but who were not in fact landed in Spain; the contract under which said shipments were made bearing date the 4th day of March, A. D. 1899, and providing, among other things, as follows:

In consideration of the faithful performance of the foregoing stipulations and in compensation therefor the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos & Company, for the transportation, subsistence, and delivery on shore of each commissioned officer the sum of two hundred and fifteen dollars ($215.00), and for each enlisted man, private soldier, or other person designated by Secretary of War for transportation the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men, or persons having been transported, subsisted, and delivered on shore in Spain.

Third. For a further counterclaim the United States alleges that the claimant herein is indebted unto it in the sum of $9,721.25 for moneys overpaid to the claimant company on supplemental bills submitted by them for shipment No. 22, on the *San Ignacio*
33 *de Loyola,* November 25, 1899, and No. 23, on the *Leon XIII,* December 18, 1899. The entire number of military officers and enlisted men shipped at Manila on these two vessels being paid for by the Quartermaster's Department at the rate claimed by the company, and on supplemental bills, the company was again allowed and paid by the accounting officers for 5 military officers at $215 each, and for 91 enlisted men at $73.75 each, shipped on the *San Ignacio de Loyola,* amounting to $7,786.25, and for 9 military officers at $215 each, shipped on the *Leon XIII,* amounting to $1,935, thus making an overpayment as above stated to the claimant company of $9,721.25, as aforesaid.

Wherefore the defendant, the United States, prays that judgment be entered against the claimant for the sums above set forth as overpayments made to the claimant company, viz:

(1)	$371,988.75
(2)	12,788.75
(3)	9,721.25
or the total sum of	$394,498.75

LOUIS A. PRADT,
Assistant Attorney-General.

34 No. 23,689.

J. M. CEBALLOS AND COMPANY
vs.
THE UNITED STATES.

IV.—*Replication by Petitioners to Counter-Claim on Behalf of the United States.*

Filed September 21, 1905.

Come now the petitioners herein by their Attorney of Record, and by way of Replication to the counter-claim heretofore filed by the defendants, state as follows:

First. That the petitioners herein are not indebted to the United States in the sum of $371,988.75, nor in any sum whatsoever, for moneys paid to the petitioners by the United States on account of the first five shipments of Spanish prisoners of War from the Philippine Islands, consisting of civil and military officials, enlisted men, minor children and others, in the vessels of the petitioner, sailing on the dates named in the first paragraph of said counter-claim; and said petitioners deny that said sum or any other sum has been paid to them or either of them on account of said shipments without au-

thority of law, or prior to the execution of any contract, express or implied, between the United States and the said petitioners.

On the contrary, said petitioners allege that said sum of $371,988.75, and all other amounts paid to them by the United States for or on account of the transportation of the Philippine
35 prisoners of War to Spain were justly and legally made to them in part payment and settlement of their account against the United States under the contract or contracts made for and on behalf of the United States by the Secretary of War with the said petitioners.

That the sums agreed to be paid for the services agreed to be rendered by said petitioners were reasonable and just; and there remains still due and unpaid by the United States to said petitioners, on account of said services rendered by them in conformity with the contracts legally made, the full sum of $293,246.25, as demanded in the amended petition heretofore filed herein.

Second. In Replication to the second counter-claim of the defendants, the petitioners state as follows:

That they are not indebted to the United States in the sum of $12,788.75, or any other sum, for moneys unlawfully paid to the claimant company by the United States for transportation of prisoners of War and others, shipped in the vessels of the claimant company from the Philippine Islands upon various dates, which said prisoners, it is alleged, were not landed in Spain. On the contrary, said petitioners allege that by the terms of the contracts made on behalf of the United States, with the petitioners herein, for the repatriation of the Philippine prisoners, it was agreed "that payment to the said company shall be made upon the basis of the number of officers, enlisted men and persons counted on each ship", and that
36 sum, so paid was lawfully paid to petitioners.

Third. By way of Replication to the third counter-claim of the defendants herein, the petitioners deny that they are indebted to the defendants in the sum of $9,721.25, for or on account of moneys overpaid to the petitioners on supplemental bills, No-. 22 and 23, and deny that the entire number of military officers and enlisted men shipped at Manila on the two vessels referred to in shipments No-. 22 and 23, were paid for by the Quartermaster's Department, or that the same was again allowed and paid by the accounting officers of the United States.

Wherefore, the petitioners, J. M. Ceballos and Company, pray that the several counter-claims of the United States hereinabove referred to be disallowed; that the said counter-claims be dismissed, and that the petitioners, the said J. M. Ceballos and Company, have the judgment of this Court for the sum of $293,246.25, as demanded in the amended petition heretofore filed herein.

JOHN J. HEMPHILL,
Atty. for Petrs.

SIDNEY C. NEALE,
EDWIN H. DUFF,
Of Counsel.

37 DISTRICT OF COLUMBIA, *City of Washington:*

Personally appeared John J. Hemphill, who being first duly sworn, deposes and says: That he is the Attorney of Record in this case, that he has carefully read the foregoing Replication, and that the statements therein set forth of his own knowledge are true, and those stated upon information and belief, he believes to be true.

JNO. J. HEMPHILL.

Subscribed and sworn to before me this 19th day of September, 1905.

[SEAL.] FRANK C. HALL,
Notary Public.

38 V.—*Findings of Fact, Conclusion of Law and Opinion of the Court.*

Filed April 22, 1907.

J. M. CEBALLOS & CO.
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

That Juan M. Ceballos, John S. Fiske, and Anderson C. Wilson compose the firm of J. M. Ceballos & Co., with their principal office at No. 27 William street, New York City, in the State of New York; said Juan M. Ceballos and John S. Fiske are citizens of the United States by birth, and said Anderson C. Wilson is a subject of Great Britain.

The members of the firm were the American operators and agents of the Compañía Transatlántica, a line of steamers engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands, and upon the vessels of which all the repatriated Spanish prisoners were transported from the Philippine Islands to Spain, or were undertaken to be transported.

Contract relations existed between the Government of Spain and the Compañía Transatlántica, beginning in 1887 and ending in 1907, and were in force at the outbreak of hostilities between Spain and the United States. In accordance with this contract and the general instructions under the same in relation to transportation, the Spanish Government had the right and the duty imposed upon it of carrying in the boats of the Compañía Transatlántica all active and licensed members of the army and navy, and all officials engaged in the civil possession of the States who should be sent to the provinces, to the colonial possessions, and to foreign ports, or who should be returning

from one or the other of these; those sentenced to penal establishments, or who returned from such establishments; the Sisters
39 of Charity, and the missionaries who traveled to one or the other of the Spanish territories; the exiled, the shipwrecked, and the poor who claimed the protection of the authorities, and the women and children and widows of the chiefs, officers of the army and navy, and of public officials, to whom there was required to be accorded the same service to which the head of the family was entitled.

The Compañía Transatlántica was ordered by the Spanish Government to repatriate all Spanish residents in the Philippines who, at the termination of the war, had to return to the peninsula, cooperating with the Government of the United States or the person or entity to whom the service for the transportation of prisoners should be awarded—the Spanish Government on its part guaranteeing the Compañía Transatlántica as the minimum price to be received for passages undertaken by the Compañía Transatlántica the amount arranged for according to the terms of the contract between the Government of Spain and said Compañía Transatlántica.

The Compañía Transatlántica sent to the Spanish Government its bill made in accordance with the rate fixed in its contract for the certain transportations which are now claimed in this suit; and the sums for which suit is now brought against the United States herein have all been settled and paid by the Spanish Government to the Compañía Transatlántica in Spain. It does not appear that the claimants, Ceballos & Co., have been obliged to pay the balances for which this action is brought, or any of said balances, to said Compañía Transatlántica or th-t plaintiffs have incurred any liability therefor.

Ceballos & Co. were agents of the company's business for ordinary traffic between New York and ports in Spain, but their agency ceased at the breaking out of hostilities between the two countries.

When hostilities between the two countries ceased Ceballos & Co. made arrangements with the Compañía Transtalántica whereby the transportation of the Spanish prisoners of war contracted for with the United States Government was effected in the vessels of said Compañía Transatlántica, and the contracts hereinafter mentioned were made between the United States and Ceballos & Co. alone.

II.

The city of Manila surrendered the 13th of August, 1898, and August 14 the United States and Spanish authorities agreed upon written terms of capitulation, of which article 5 is as follows:

"All questions relating to the repatriation of officers and men of the Spanish forces and of their families and of the expenses which said repatriation may occasion, shall be referred to the Government of the United States at Washington."

III.

By the treaty of peace executed at Paris by representatives of Spain and the United States on December 10, 1898, it was stipulated in paragraph 1, article 5, that—

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in article 6, that—

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

IV.

There was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval, and military officers and their families, and a much larger number of enlisted men, together with the wives and children of some of these enlisted men. Many of these were in a pitiable condition physically, exhausted with exposure and disease—1,200 being sick at one time—all of them fed, guarded, and attended at the expense of the United States. Small-pox had been prevalent and infection was apprehended. The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the Government of Spain. Many of these had wives and children with them. There were besides a number of civilians, such as nurses, nuns, monks, friars, sisters of charity, and lady pensioners. The United States treated all of these classes as prisoners of war, and had supreme control of them after the surrender of Manila until they were delivered aboard plaintiff's ships for transportation, at which time the supervision of the United States ceased. Spanish officers had in the meantime only such supervision over their troops as the United States permitted.

V.

General Otis, commanding the United States forces in Manila, considered that an emergency existed requiring immediate action, and on October 7 and October 24, 1898, cabled the War Department at Washington the request of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compañía Transatlántica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but under an oral agreement with plaintiffs as hereinafter stated.

Bills for these shipments were rendered after the execution of the written contract.

41 VI.

In the emergency deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, entered into an oral agreement with the petitioners under their firm name of J. M. Ceballos & Co., by which the latter agreed to transport such of the Philippine prisoners as the United States desired to return to Spain, the price to be paid for such transportation to be the price fixed after the United States should advertise for bids for such transportation, under contract expected thereafter to be entered into under the terms of a treaty of peace between the United States and Spain.

Under this oral agreement the petitioners immediately began furnishing vessels, and the transportation of the Philippine prisoners commenced by the first vessel in charge of plaintiffs which sailed from Manila November 7, 1898, and continued until another and a written contract was entered into for the transportation of those prisoners not transported under the oral agreement.

VII.

January 20, 1899, the Quartermaster-General of the Army advertised for bids for suitable vessels for the repatriation of the Spanish prisoners. Following is a copy of his advertisement:

"WAR DEPARTMENT,
"QUARTERMASTER-GENERAL'S OFFICE,
"WASHINGTON, D. C., *January 20th*, 1899.

"Transportation for Spanish Prisoners of War from the Philippine Islands to Spain.

"By direction of the Secretary of War, sealed proposals are invited for the transportation of the Spanish prisoners of war now in the Philippine Islands from Manila or such other ports in the Philippine Islands as may be most convenient for their embarkation to Cadiz or such other ports of Spain as may hereafter be designated. Their number is estimated as about 16,000 officers and enlisted men. Cabin accommodations are to be supplied for the officers and third-class or steerage accommodations, having suitable galley accommodations, conforming to the United States requirements as to space and ventilation, for the enlisted men.

"The United States Government will deliver the prisoners on board the vessels at Manila, or such other ports as may be designated for their embarkation. Proposals will state the price per capita for transporting officers and for transporting enlisted men and for their subsistence and delivering them on shore at the Spanish port, or ports to be designated, and will be accompanied by a guarantee that the prisoners will be comfortably cared for and subsisted while on the journey. The subsistence to be equal to the United States 'garrison' rations, as follows. One thousand complete rations. Meat—Pork,

1-10, 75 pounds net weight; bacon, 2-10, 150 pounds net weight; tinned roast beef, 7-10, 700 net weight. Flour or hard-bread, net weight 1,000 pounds. Vegetables—Dried beans, net weight
42 75 pounds, or rye, net weight 50 pounds; fresh potatoes, net weight 800 pounds; onions, net weight 200 pounds. Coffee, roasted, net weight 80 pounds. Soap, net weight 40 pounds. Salt, net weight 40 pounds. Pepper, black, net weight 25 pounds.

"Proposals will state the number of vessels which are proposed to be used for the service; the name and classification of each; the tonnage capacity of each; their speed; the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage from Manila to the coast of Spain. Proposals will also state the time at which each vessel will arrive in the harbor of Manila and report to the chief quartermaster at that place ready for the embarkation of the prisoners of war. Vessels of any nationality may be tendered and will be considered for the service required. Payment for the service will be made when evidence is furnished that the ship has arrived with her passengers at point of destination. The number of officers and men counted aboard at place of embarkation by the quartermaster is to determine the number to be paid for. Proposals should be addressed to the depot quartermaster, San Francisco, California, at which place they will be opened at 12 o'clock m., standard time, on the 1st day of February, 1889, and submitted to this office. The Government reserves the right to reject any and all proposals submitted.

"M. I. LUDINGTON,
"Quartermaster-General, U. S. Army."

VIII.

The petitioners, through R. A. C. Smith, their attorney-in-fact, submitted their bid, accompanied with the number and names of the vessels, etc., as required by the advertisement, which bid was accepted by the War Department and is as follows:

"SIR: In accordance with the advertisement of Gen. M. I. Ludington, Quartermaster-General, U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Co., agents of the Compañiá Transatlántica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain. (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

"It is proposed not to load the steamers beyond two-thirds of their steerage capacity. This is considered not only advisable as an act of

humanity, but absolutely necessary, owing to climatic conditions and length of voyage.

"I further propose to call at any port of the Philippine Islands that the U. S. Government may designate, provided the vessels can safely lay afloat.

"The charge for this service is dependent on the ports of call in the Philippines and also on the quarantine regulations in
43 Spain, but I propose and hereby agree to do this service at a price not to exceed in any case:

"For each officer..... $215.00
"For each enlisted man..... 73.75

"It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

"I will furnish a satisfactory bond for the faithful fufillment of this service.

"Very respectfully, R. A. C. SMITH."

IX.

The bid of petitioners was accepted, and on March 4, 1899, the contract was put in writing and signed by Hon. R. A. Alger, Secretary of War, on behalf of the United States, and by J. M. Ceballos & Co., through R. A. C. Smith, attorney-in-fact, and is as follows:

"Whereas, under the terms of the treaty of peace entered into by and between the representatives of the Governments of the United States and of Spain, signed at Paris on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of Article V, that

" 'The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces.'

"And in Article VI, which reads as follows:

" 'Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

" 'Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

" 'The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.'

"And whereas sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the pro-

posal of J. M. Ceballos & Company, of New York, having been duly accepted by the Secretary of War of the United States,

"Therefore this article of agreement is made and entered into this 4th day of March, 1899, by and between the Secretary of War and the said J. M. Ceballos and Company, for the transportation of the said prisoners of war, from the Philippine Islands to Spain, as are designated in the terms of the treaty of peace, referred to and quoted herein.

"The said J. M. Ceballos and Company hereby agree to furnish good and safe transportation for such number of prisoners of
44 war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.

"The said company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war *and such other persons* as may be designated by the Secretary of War, *with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men and other persons on board each ship;* that the subsistence furnished by the company shall be equal in every respect to the United States Army garrison rations.

"The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform *the entire service as herein stipulated,* so that the embarkation of the last of the prisoners of war and other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

"In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos and Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215.00), and for each enlisted man, private soldier, or other person designated by the Secretary of War for transportation the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men, or persons have been transported, subsisted, and delivered on shore in Spain.

"It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers to be paid by the

United States at the rate of fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and forty cents for each enlisted man per day. An account of the number of officers, enlisted men, or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company, and payment to the said company shall be made upon the basis of the number of officers, enlisted men, and persons counted on each ship.

"It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

45 "No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

"In witness whereof we hereunto set our hands and seals this 4th day of March, A. D. 1899.

"(Sgd.) R. A. ALGER, [SEAL.]
"Sec'ty of War.
"J. M. CEBALLOS & CO., [SEAL.]
"By R. A. C. SMITH, *Attorney in Fact.*

"Witnesses:
"(Sgd.) G. D. H. HOPKINS,
"As to R. A. A.
" " L. F. RANDOLPH."

X.

In performing the obligations of their contract the petitioners supplied vessels with cabin accommodations and steerage accommodations, as had been agreed, and in the cabins were carried the officers, civil and military, with their respective families, and in the steerage the enlisted men and their families and other persons entitled to third-class passage. If any persons other than officers were given cabin accommodations the United States did not assign or place such persons in the steamers' cabins.

It does not appear from the evidence in the cause that the United States assigned or designated cabin accommodations for the commissioned officers or the wives and children of the commissioned officers. The evidence does establish to the satisfaction of the court that when the wives and children of the military and civil officers of the Spanish army in the Philippine Archipelago went on board the plaintiffs' vessels the plaintiffs made no claim that the United States should pay for the wives and children of such commissioned officers at commissioned officers' rates.

XI.

For the first twenty-five shipments of prisoners of war from the Philippine Islands to Spain payment was made by the Government of the United States upon the certificates of the masters of the respective ships on which said prisoners of war and other persons were transported, certified to be correct at the place of landing, showing the different classes of passengers; and payment was made for the total number of prisoners of war and other persons shipped at Manila, as shown by such certificates, regardless of the fact that many of those so shipped died or were left en route and were not landed in Spain.

XII.

The obligation of this country to repatriate any other persons or classes of persons than those who were actually prisoners of war or political prisoners was questioned by the American Secretary of War.

46 On December 18, 1899, the Secretary of War addressed an official letter to the Attorney-General stating that under the terms of the treaty of peace the obligation of the United States to send to Spain at its own cost the wives and children of officers and soldiers and civil prisoners designated as officials and their wives and children was not clearly defined, and that the rates of compensation for the transportation of such persons were not set forth in the contract. But in that connection the Secretary requested an opinion as to the construction of the treaty of peace in regard to the scope of the description of Spanish prisoners, whether and to what extent the treaty included the repatriation of noncombatants at the cost of the United States. The Secretary further requested a construction of the contract rate of compensation which might be allowed and paid per capita for each class of persons charged for under the terms of the contract with Ceballos & Co. On January 6, 1900. The Attorney-General answered this official communication of the Secretary of War and construed the contract substantially as follows: That it was questionable whether all the persons tendered and transported were not within the purview of the treaty, but that this was a question for the United States authorities and not for the carrier who would have been guilty or might have been guilty of a breach of his contract in refusing to carry persons designated to be carried by the United States. The Attorney-General further informed the Secretary of War that the contract related to the transportation of prisoners; that as between the contracting parties it rested alone with the United States to say who it would send back to Spain, and in doing so to alone determine who were prisoners and who came within the purview of the treaty or the contract. That the words "other persons" were included within "enlisted men," and that as to all enlisted men and all persons other than officers, military and civil, $73.75, and no more, was payable by the United States to plaintiffs under the contract.

XIII.

The Comptroller of the Treasury concurred in the construction given to the contract by the Attorney-General.

XIV.

On January 19, 1900, the Secretary of War notified one of these plaintiffs that he had, on January 17, cabled General Otis at Manila that civil officials, prisoners' wives and children were entitled to passage to Spain, and that the contract provided for shipment of civil officials as officers on the basis of $215 per capita; that wives and children of officers, soldiers, and civil officials were entitled to transportation to Spain on the basis of $73.75 per capita. In this connection the Secretary of War notified J. M. Ceballos that "in the reports received from the commanding general in the Philippines as to the number of Spanish prisoners of war embarked upon the ships for transportation to Spain, the number of officers and soldiers only have been stated, and these do not correspond with the
47 number of those charged for in the bills of your company submitted to the Department. That "these reports covered seventeen shipments only" * * * and that "further payment upon the bills is deferred, awaiting receipt of report called for by the Department of November 27, 1899," relating to the number of passengers.

XV.

Of the last 15 shipments of prisoners of war, running from February 20, 1900, up to July 14, 1901, the list of passengers shipped, as shown by requests for transportation and quartermaster's requisitions (based on requests from the Spanish authorities) is as follows:

Military officers	164
Civil officials	28
Military officers' wives	29
Military officers' children (major)	35
Military officers' children (minor)	5
Enlisted men	1,560
Enlisted men's wives	9
Enlisted men's children (major)	6
Enlisted men's children (minor)	6
Civil officials' wives	13
Civil officials' children (major)	9
Civil officials' children (minor)	3
Civil Spanish subjects	11
Wives of civilians	3
Children of civilians (major)	8
Children of civilians (minor)	3
Monks	24
Priests	37
Civil lady pensioners	2
Major child of civil lady pensioner	1

Spanish subject, wife, and child	3
Child of telegraph operator (minor)	1
Child of civil lady pensioner (minor)	1
Total	1,971

Upon the above shipments the Auditor for the War Department made the following allowances:

Officers (which included civil officials of the class of military officers), 184, at $215 each.

Enlisted men and other persons, 1,589, at $73.75 each.

And disallowed payment for the following persons because not called for and not included in requests for transportation of the claimant company at the time of embarkation.

Military officers	5
Civil officials	3
Military officers' wives	0
Military officers' children (major)	7
Military officers' children (minor)	0
Enlisted men	61
Enlisted men's wives	9
Enlisted men's children (major)	6
Enlisted men's children (minor)	0
Civil officials' wives	4
Civil officials' children (major)	9
Civil officials' children (minor)	0
Civil Spanish subjects	11
Wives of civilians	3
Children of civilians (major)	8
48 Children of civilians (minor)	3
Monks	24
Priests	37
Civil lady pensioners	2
Major child of civil lady pensioner	1
Spanish subject, wife, and child	3
Child of telegraph operator (minor)	1
Child of civil lady pensioner	1
Total	198

Making 198 persons in all whose passages were not allowed for by the Auditor for the War Department for the reason that they were not included in requests for transportation.

If allowed for such service on the basis of $215 for each military and civil official, and $73.75 per capita for enlisted men and other persons, the amount due to plaintiffs on the said 198 persons would be $15,732.50.

The method of counting prisoners entitled to transportation under the contract was changed as to the last fifteen shipments so that requests for transportation with reference to available space should

be made upon the plaintiffs. Thereupon a requisition for transportation was issued by the United States quartermaster at Manila in words and figures following, to wit:

"HEADQUARTERS DEPARTMENT OF THE PACIFIC AND
"EIGHTH CORPS, U. S. ARMY,
"AYUNTAMIENTO, MANILA, *April* 10, 1900.

"J. M. Ceballos & Co.

"SIRS: Under articles of agreement dated February ——, A. D. 1899, between the Secretary of War and J. M. Ceballos & Co., you are requested to furnish transportation to the following Spanish prisoners from Manila, P. I., to Spain on steamship *Leon XIII:*

"Payment for this service will be made in Washington, D. C., U. S. A., at the office of the Quartermaster-General of the Army.

" 10 commissioned officers.
" 258 enlisted men.
" 3 civilian officials.
" 8 wives of officers and officials.
" 3 children under 3 years of age.
" 6 children 3 years to 10 years of age.
" 1 child over 10 years of age.
" Approved.
" By command of Major-Gen. E. S. Otis, U. S. V., military governor P. I.:

"C. P. MILLER,
"*Major and Quartermaster, U. S. A., Chief Quartermaster.*
"C. H. MURRAY,
"*Major and Inspector-Gen., U. S. V., Secretary.*"

Pursuant to the requisition of the Quartermaster-General all the men who were placed on the list of passengers for each shipment were required to be at a particular place at a certain time in the morning, and they were counted by an officer * * * of the Quartermaster's Department * * * and taken aboard launches and carried out to the Spanish vessel ready to sail; and as they went on board, the persons mentioned in the requisitions were
49 counted by another United States officer accompanied with the officer who represented the steamship company. Occasionally permission was given to officers of considerable rank to go aboard in their own conveyances, and these were checked off when they went aboard by an officer representing the Government and an officer representing the plaintiffs, and were thereby included in the numbers called for by the requisitions.

The 198 persons now claimed for were not included in the count at the time and place of embarkation.

No objections were offered at the time of the change in the method of computing the number of persons to go aboard by the plaintiffs.

The accounts presented to the Treasury for payment asked compensation for 198 persons, according to a certificate in form and figures following, to wit:

"BARCELONA, SPAIN, ...

"I certify that the following Spanish prisoners have been furnished transportation from Manila, P. I., to Spain by J. M. Ceballos and Co. on steamship *Leon XIII:*

"10 commissioned officers.
"259 enlisted men.
"5 civilian officials.
"8 wives of officers and officials.
"3 wives of enlisted men.
"2 children under 3 years of age.
"6 children 3 years to 10 years of age.
"2 children over 10 years of age.
"2 children of enlisted men under 3 years of age.
"4 children of enlisted men under 3 years to 10 years.
"5 children of enlisted men over 10 years.
"3 volunteers, 3d class.

"JAMES G. LAY,
"American Consul."

The foregoing form of requisition for transportation was used for fourteen other ships besides the steamship *Leon XIII,* but on different dates, according to time of sailings, and embraced officers, enlisted men, and other persons on which the count was made as set forth.

The evidence does not establish to the satisfaction of the court that these 198 persons certified to by the American consul at Barcelona were prisoners of war, entitled to transportation under the contract.

XVI.

The following sums have been paid to the claimant company for the transportation of prisoners of war, consisting of officers, enlisted men, and other persons, in the ships of the Compañía Transatlántica, between the 7th day of November, 1898, and the 14th day of July, 1901, embracing the following classes at the following amounts:

1,613	military officers, at $215	$346,795.00
405	military officers' wives, at $73.75	29,868.75
575	military officers' children (major), at $73.75	42,406.25
301	military officers' children (minor), at $36.875	11,099.375
15	minor children, at $73.75	1,106.25
338	civilian officials, at $215	72,670.00
78	civilians, at $73.75	5,752.50
50 157	civilian officials' wives, at $73.75	$11,578.75
187	civilian officials' children (major), at $73.75	13,791.25
94	civilian officials' children (minor), at $36.875	3,466.25
3	civilian officials' children (minor), at $73.75	221.25
13,583	enlisted men, at $73.75	1,001,746.25
19	enlisted men's wives, at $73.75	1,401.25
25	enlisted men's children (major), at $73.75	1,843.75
11	enlisted men's children (minor), at $36.875	405.625
6	enlisted men's children (minor), at $73.75	442.50
	Making total payment of	1,544,595.00

XVII.

The total number of prisoners of all classes delivered by the United States aboard ship for which there were quartermaster requisitions and transported by the petitioners, in accordance with their two contracts (one of which was oral and the other of which was in writing, and set forth herein), was 17,305—that is to say, 1,938 naval and military and civil officers and 15,367 enlisted men and other persons. The total amount due the petitioners for such service, upon the basis of $215 per capita for the 1,938 military and naval officers and $73.75 for each enlisted man and other person, is $1,549,986.25.

The total amount paid to the petitioners by the United States at various times and by sundry checks as part payment of this indebtedness (which amount includes the defendants' counterclaim of $9,721.25) is $1,544,595, as set forth in previous findings.

The balance due the petitioners by the United States for such service is $5,391.25.

XVIII.

In addition to the total number of prisoners of war and other persons delivered by the United States aboard ship at Manila and transported by the petitioners in accordance with their two contracts (one of which was oral and the other of which was in writing), which amounted to 17,305 passengers of all classes, there were carried in the same ships and at the same times, along with said prisoners of war and other persons transported on account of the United States Government, 6,481 passengers.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are entitled to judgment against the United States in the sum of five thousand three hundred and ninety-one dollars and twenty-five cents ($5,391.25).

Opinion.

HOWRY, *J.*, delivered the opinion of the court:

The subject-matter of this controversy is the expense involved in the repatriation of certain prisoners of war from the Philippine Islands succeeding the close of hostilities between this country and Spain. The issues arise on the demand of the plaintiffs, stating a total earned of $1,837,841 and claiming a balance amounting to $293,246.25 alleged to be due under two agreements, one
51 verbal and one in writing, on account of services alleged to have been performed by them for the repatriation of 17,527 persons.

The first thing to be considered relates to the action of the parties under the alleged parol agreement. Payments for large amounts were made without any written contract for the repatriation of those

prisoners whose presence was deemed specially undesirable. These payments cover the first five shipments and amount to a sum aggregating $371,988.75. Defendants deny the existence of any oral agreement, and allege that until the treaty was signed an authorized agreement was impossible for the reason that the authority for an agreement could only come from the treaty itself. Restitution of the amount of the expenditures under the alleged parol agreement is demanded by way of counterclaim.

On August 12, 1898, our Secretary of State and the French minister at Washington, acting for the Spanish Government, entered into a protocol for the cessation of hostilities between the United States and Spain, in which it was provided that "the United States will occupy and hold the city, bay, and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines." Manila surrendered the next day, and the authorities of the two Governments there agreed in writing that "all question relating to the repatriation of officers and men of the Spanish forces and of their families and of the expenses which said repatriation may occasion shall be referred to the Government of the United States at Washington." The prisoners were then estimated to number about 16,000, but an actual count subsequently increased the estimate to something over 17,000 persons.

No steps were taken immediately for any removal. But the necessity existed to bring about better conditions in the fallen city. The Spaniards themselves were perhaps anxious to go home, and it was understood by both sides that, under the terms of the capitulation, the military occupation of the United States was likely to be permanent. There was a large number of sick and wounded in the vicinity of Manila and elsewhere in the archipelago. These numbered more than 1,000 persons, and the persence of so many was a menace to the health of the place. Out of these conditions arose the actual transportation of a large number for which accounts were presented and paid and from which the first counterclaim has arisen.

It is proper at this point to notice plaintiffs' contention that by the action of the accounting officers, who approved the accounts, the defendants are precluded from disputing the correctness of the payments for the five shipments in dispute.

Jurisdiction to hear set-offs was conferred by an act approved March 30, 1868, which provides for revision of settlements (15 Stat. L., 54). This statute is now section 1061 of the Revised Statutes, which, in turn, was reenacted by the first section of the Tucker Act with respect to all set-offs on the part of the Government against any claimant in this court. There is no reason to discredit the set-off merely because the accounts were passed upon at the Treasury. True, the presumption is that the payments were lawfully made, and this presumption continues until the contrary appears. The fact
52 that the action of the accounting officers (who generally resolve every doubt in auditing public accounts in favor of the Government) is under consideration at the instance of the law officers of the Government in no wise diminishes the value of the

demand for restitution. Quite the contrary. The very object of the statute relating to the revision of settlements is to place the action of those most responsible for them under the watchful care of those whose duty it is to appear for the Government in the courts. The right to recover moneys illegally paid by a public officer exists in this court even without a counterclaim whenever it appears that the settlements are unlawful. (*Wisconsin Central R. R. Co. vs. U. S.*, 164 U. S., 190.)

The material inquiry, then, is the nature of the operations under which the first five shipments were made. We have carefully considered this phase of the matter because of its immediate bearing upon the claim for a large refund. As our findings are not the subject of review, their importance can not be overestimated.

The telegraphic correspondence between General Otis, commanding in the Philippines, and the Adjutant-General of the Army in Washington tends to rebut the idea of any parol agreement of the first shipments at the expense of the United States. But the commander there did not, so far as this evidence shows, know that Ceballos & Co. were in consultation with the Secretary of War here. The correspondence offered in evidence does not in itself disprove the allegation that negotiations were then going on at the seat of government for the removal of the sick from the Philippine Islands to Spain. It is historically true also that negotiations were in progress at the same time for the removal of the sick and wounded prisoners of war from Porto Rico and Cuba. But there was a special necessity to get the sick and wounded from the more distant conquered territory. The correspondence recognized these conditions for the relief of a state of affairs which was as well understood by the Government at home as by the commanding general on the spot.

Careful scrutiny compels us to say we are unable to see any actual inconsistency in the testimony relating to the occurrences here with respect to the initial shipments. It positively appears from the plaintiffs' testimony that an agreement was made with the Secretary of War. Neither the Secretary nor any civil or military authority of the Government in the War Office has ever made any denial of the direct testimony relating to the agreement. This agreement is proven by Ceballos & Co. as having been made in Washington with the Secretary of War. It is inferentially corroborated by the subsequent telegrams of the commanding general in the Philippines that in all instances the departure of the prisoners was urged and hastened. Finally, the Treasury officers were satisfied (by the response to their first objections) to make the payments for the shipments, and with the sufficiency of the agreement exhibited in the correspondence with the War Department in that connection. The findings establish the parol agreement between plaintiffs and the Secretary of War. The particulars are there set forth in the nature of a special verdict, which are believed by the court to substantially embody all that is material in the matter in dispute. Without multiplying words on this part of the case was pass to the question of the sufficiency of the agreement.

53 Government liability to pay anything under the parol agreement is denied by defendants because any contract, they say, with respect to the first five shipments was within section 3744 of the Revised Statutes, and not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," can not be sued upon. Defendants cite *Clark v. United States,* 95 U. S. 539; *Saloman v. United States,* 19 Wall., 17; *South Boston Iron Co. v. Same,* 118 U. S., 42; 18 C. Cls. R., 165; *Lindsley's case,* 4 *id.,* 359; *Jones's case,* 11 *id.,* 733; *Steele's case,* 19 *id.,* 181.

But this is a completed agreement. The service was actually performed and defendants got the benefit of it. In a recent case in the Supreme Court—affirming this court—Mr. Justice Holmes said that if the United States, instead of paying for the subject-matter of the suit there had set up the invalidity of the contract, the claimant could still have sued on a *quantum valebat.* (*St. Louis Hay Co. v. United States,* 191 U. S., 163.) In that case the court cited the leading case of *Clark v. United States, supra,* with approval, where it was held that if a parol contract has been wholly or partially executed and performed on one side, the party performing will be entitled to recover the fair value of his property or service as upon an implied contract for a *quantum meruit.* An examination of these two cases we think authorized settlement of the right of plaintiffs to recover on whatever the services are shown to be worth.

But there is another aspect in which this part of the case may be viewed. It has appeared that by the terms of the capitulation the expenses of the repatriation were referred to the United States pending the treaty. This language did not make a contract, it is true, but it certainly threw the responsibility upon our Government to consider for itself the matter of expense in the intended removal of the captives. The situation of the prisoners and the small naval and military force of the United States among millions of natives made it very desirable for this Government to rid the islands of Spanish influences as quickly as possible. We have already adverted to the burdens imposed by the presence of the sick and wounded. Smallpox had been prevalent and there was fear of infection. The prisoners were as anxious to go as our authorities were to see them go, and it is reasonably certain that it was assumed (under the terms of the capitulation) by both Governments that the United States would bear the expense incident to repatriation when that question came to be considered. That it was to be considered is evident from the terms of the agreement of capitulation. Contracts for services made in emergencies and under exigencies need not always rest upon advertisements or be in writing. (Secs. 3709 and 3732, Rev. Stat.; *U. S. v. Speed,* 8 Wall., 77.) The state of affairs shown by the findings appear about as emergent as anything well could be, and the counterclaim on this point can not be sustained.

Independent of the statute authorizing parol agreements in cases of emergency, certain acts done in the exercise of the war power by public agents bind the Government to pay regardless of a contract in writing. "No one disputes the proposition," recently said one of the ablest constitutional lawyers in the country, "that when territory

is acquired by conquest the President, as Commander in Chief of the Army and Navy, may continue to hold and govern it through
54 the military authorities until such time as Congress can exercise its jurisdiction." The functions of any sort of government in conquered territory are to preserve order, protect the lives and property of the inhabitants, and preserve the interests of the conquering power until the constitutional authority of the proper civil agencies can be established by Congress upon the cession of the territory. The situation of the prisoners and the burdens imposed by the conditions to which we have adverted as existing there made it immediately desirable to provide for the prisoners elsewhere. A commander in the field, with prisoners on his hands, with no treaty to guide their disposition, could certainly incur reasonable expenditures incident to removal without the formalities of a written agreement. Actual necessity for quick action existed.

The Secretary of War could, of course, provide the same thing which a commander could direct. In legal contemplation the Secretary is an arm of the Executive. "The President speaks and acts through the heads of the several Departments in relation to subjects which appertain to their respective duties." (101 U. S., 770.) Anything the President may lawfully do the head of a Department may do in his name. So, unless public money is better protected than the safety and lives of inhabitants, and unless an army of occupation must be sacrificed to emergencies, the expenditures for the removal of sick and wounded captives was a proper charge against the Treasury independent of any contract, if the Secretary of War directed it, as we have found he did do.

We come now to the treaty of Paris of December 10, 1898, and the written contract under it.

The treaty provided: "The United States will, upon the signature of the present treaty, send back to Spain at its own cost the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces." Article VI provides that "the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines."

"The Government of the United States will at its own cost return to Spain, and the Government of Spain will at its own cost return to Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, the prisoners caused to be released, respectively, by them under this article."

When the treaty was promulgated, the Quartermaster-General advertised for bids for suitable vessels for the repatriation of the Spanish prisoners, estimating their number at 16,000. Plaintiffs submitted a bid for this contract, accompanied with the number and names of the vessels, which was accepted by the Secretary of War, and on March 4, 1899, a written agreement for the repatriation of the Spanish prisoners was executed by the Secretary and these plaintiffs. Under this contract the prisoners then on hand were transported, subsisted, and landed in Spain, except as hereinafter set forth. Under the terms of the contract the officers were to be repa-

triated on the basis of $215 for each officer and the enlisted men and other persons on the basis of $73.75 for each person.

Plaintiffs agreed for the purposes of the contract that they would provide a sufficient number of steamships for the safe and
55 comfortable transportation of prisoners of war and such other persons as might be designated by the Secretary, with cabin accommodations for all officers and third-class for steerage passengers, with ample gallery accommodations, space, and ventilation, for the enlisted men and other persons on board each ship, and that the subsistence furnished by the company should be equal in every respect to the army garrison rations. In consideration of faithful performance the Secretary of War agreed on behalf of the United States to pay to plaintiffs the contract price mentioned above, upon evidence that the officers, enlisted men, and other persons so designated were transported, subsisted, and delivered on shore in Spain.

Pending the execution of the treaty and the contract under it the obligation of this country to repatriate persons other than soldiers or political prisoners was questioned by the Secretary of State. Thereupon the Secretary of War requested construction of the law officers of the Government with regard to the repatriation of the families of the officers and of civil prisoners in the hands of the insurgents. The Secretary was advised by the Attorney-General that the provisions of the contract under the treaty embraced noncombatant prisoners as well as soldiers and all prisoners captured and held by the United States or held and released by the insurgents, whether their detention was originally voluntary as to them or otherwise. His opinion was that the United States had the right to adopt as against themselves as liberal a construction of the treaty as they chose, and that this Government would not have tolerated any such impertinence or delay as would have resulted in the contractors questioning the action of the Government, and that the contract when referred to the treaty was not *ultra vires* the Secretary of War. (23 Opin. Att'y Gen., 14.)

No questions were raised respecting the conduct of the Government in carrying out the treaty under the construction given by the Executive Departments. Nor did the accounting officers of the Treasury object to making the payments as the bills were presented. But it is now argued that it is open to grave question whether any obligation was imposed on the United States by the treaty of Paris or the contract under it to carry to Spain the civilians, the women and children, and other noncombatants, who could not properly be classed as prisoners of war.

The treaty provided that the United States would release all persons made prisoners of war by the American forces. Undoubtedly every Spaniard in the archipelago was considered a prisoner of war. Certainly no one of them could have left the islands without the permission of the commander of the American forces. The original terms of capitulation referred to this Government all questions relating to the repatriation of officers and men of the Spanish forces *and of their families* as well. Said the Attorney-General, the contractors had nothing to do with the construction given by this

Government as to what was to be done. Certainly they had no discretion except to transport all persons tendered by the United States aboard their ships. Plaintiffs were carriers only, without opportunity or power to determine who were entitled to transportation, and had they, as carriers, undertaken to decide that question for themselves they would have done so in violation of one of the
56 express provisions of the contract and at their own risk as for a breach. Any objection raised by the contractors as to the nature of the treaty would probably have resulted in stopping the business of embarkation. Whether the treaty obligation extended to the repatriation of monks, nuns, priests, sisters of charity, and the families of the officers and enlisted men, at the expense of this country, does not seem to us as now presenting material inquiry under the contract.

But the most important question is as to the price to be paid for persons other than commissioned officers and enlisted men who were treated as prisoners by the United States. Plaintiffs claim that the wives and children of all military and naval officers and of all civil officials, besides sundry cabin passengers, must be paid for at the rate of $215 for each person on all shipments. They undertake to support their contention by what they say were the views of the Secretary of War when the shipments were being made, from which it appears that as to certain noncombatants, which included wives and children of officers and soldiers and civil prisoners, the Secretary said that the obligation of the United States was not clearly defined in the treaty and that the rates of compensation for the transportation of such persons were not set forth in the contract. Plaintiffs urge that the United States should not now persuade its courts to adjudge the obligation of the treaty so that any part of the expense incident to repatriation should be borne by Spain. Defendants contend that the contract fixed the rate to be paid for the wives and children of the military, naval, and civil officers, as well as all persons other than officers, at a rate which must exclude all these other persons from the higher rate. They rely upon the construction given to the contract by the Attorney-General, who said that there were but two rates of price to be paid for the service, and that the lower rate covered each person other than an officer transported to Spain (23 Opin. Attorneys-General, 14).

It is true that the cost of transportation was not defined in the treaty, but the cause of action does not grow directly out of treaty stipulation, nor is the right to recover dependent upon any part of the treaty. If it were, the jurisdiction to proceed might be questioned under § 1066 of the Revised Statutes, unless the act of 1887, commonly known as the Tucker Act, repealed the earlier statute prohibiting the exercise of jurisdiction by this court in cases dependent entirely upon treaty stipulation. Without considering the treaty obligation we pass to the contract, because plaintiffs must stand upon that, as the proximate cause of action is the contract and not the treaty.

As to this contract, the Secretary of War did say that the rates

of compensation for the transportation of persons other than officers did not appear to be set forth.

But the Secretary was not undertaking to construe the contract, and whatsoever views were advanced by him were only incidental to inquiries propounded to the law officers of the Government when their advice was sought to determine his official action; for within a few days the Secretary of War notified one of these plaintiffs that civil officials and prisoners' wives and children were entitled to passage, but that the contract provided for shipment of
57 civil officials as officers at the higher rate, and the wives and children of officers, soldiers, and civil officials at the lower rate.

It is urged by plaintiffs that when they submitted their bid it was their expectation to make two classes of people and two classes of accommodation, and to receive two classes of payment for every person transported, whether a military or political prisoner, male or female; that the words "other persons" were used to designate classes and not "officers," or "soldiers" of the captured army; that the words as used in the contract are subject to interpretation in connection with other parts of the agreement, from which it is unreasonable to suppose that it was intended that women should be transported as steerage passengers.

The phrases "other persons," "persons," or "all other persons" occur seven times in the contract. The higher rate related to one class and the lower rate to another class, and within the second class the contract embraced priests, nuns, sisters of charity, all women and children and every other person designated within the term "prisoners" by the United States.

However proper it might seem that the families of the officers should have been given the same kind of accommodations as the officers themselves, plaintiffs can not narrow the meaning of the agreement by the restrictions which they now allege to have been their expectations—that only enlisted men were to go at the lower rate.

The fifth paragraph of the contract, being free from ambiguity, must control, unless there is something else in the contract, which, taking the agreement as a whole, operates to destroy the terms fixing the rates for the families of officers upon a different basis from the rates fixed for the officers themselv The advertising for bids called for cabin accommodations to b applied to the officers, and third class, or steerage accommodations, conforming to our regulations as to space, for enlisted men. The proposals were to state the price *per capita* for transporting officers and for transporting enlisted men and for their subsistence, and delivering them in Spain, accompanied by a guaranty that the prisoners would be comfortably cared for and subsisted while on the journey. Exactly why the advertisement for bids called for two classes instead of three classes does not appear. It does not appear that the proposal of plaintiffs to furnish the transportation conformed to the advertisement, because the proposal offered to perform at a price *"not to exceed* in any case $215 for each officer and $73.75 for each enlisted man."

Why the contracting parties still ignored the anomalous status of women and children, and other noncombatants, remains unexplained. But, though plaintiffs' bid was accepted by the United States, the contract in evidence was executed. By its terms the higher rate was applied to officers only and the lower rate "for each enlisted man, private soldier, *or other person.*" Thus, there is nothing in the agreement, and in the negotiations leading up to the agreement, which destroys the effect of the clause fixing the rate on the basis indicated by its language. Indeed, it would seem that the minds of the contracting parties met very clearly when the proposals, and the acceptance of the same, came to be exactly defined by a written contract.

Undoubtedly both parties to the agreement expected the repatriation to include every person on the islands whom the United
58 States regarded as prisoners of war. For plaintiffs now to claim that a rate equivalent to that bid for commissioned officers should be applied to their families would seem unjust to the Government, because the logical conclusion arising from such a contention would be a full rate for every child occupying cabin accommodations as first-class passengers, contrary to the rules and customs governing the transportation of children across the seas at a lower rate than adults. Inasmuch as the rate was not to exceed the sums indicated in the proposals, it is clear that the way was left open for a lower rate than that called for by the advertisement and the proposals in question. It is equally clear that when the parties came to make a contract they agreed that two rates should govern, and it then devolved upon plaintiffs to provide such quarters as should be safe and comfortable for all. Plaintiffs can not now be heard to say that the accommodations for those carried at the lower rate were not safe and comfortable, and before they can collect the officers' rate for the persons not entitled to cabin accommodations they must show that defendants imposed upon them the obligation to furnish more than it contracted to furnish.

But this does not appear. The evidence does not establish that the United States had anything to do with the assignment of the quarters of the persons repatriated under the contract, but that these persons were merely delivered in Manila Bay to the plaintiffs' steamers to be counted and transported according to contract. Doubtless plaintiffs contracted upon the expectation of profit on the whole contract and got it. Whether they did or not find the contract profitable the court can not undertake to transpose the words "other persons" from the lower rate to the higher. The function of the court is not to make a contract for the parties.

The cause of action is on the express contract embracing all repatriations undertaken. There is nothing in the transactions of the parties outside of the express agreement to indicate that compensation for any service to be performed by plaintiffs was contemplated or that they could perform any service which should be paid for on a different basis than that expressed in the writing. There is therefore no room to invoke *quantum meruit.* As said in *Hartman v. United States* (40 C. Cls. R. 133), "the express written agreement

excludes the possibility of implied contract;" and that the minds of the parties met when they formulated their written agreement for the lower rate to include women and children seems clear from the prevailing conditions to be gathered from the official correspondence, which shows that early doubts existed as to who were to be regarded as prisoners. But the parties proceeded upon the as-umption that civil officials and women and children were to go and constructed their agreement accordingly. That this agreement was mutually satisfactory and profitable to both must be concluded from what the agreement itself shows and the circumstances under which it was made. Some doubts as to whether civil officials and women and children were to be regarded as prisoners at all entitled to transportation under the treaty must have been shared by the Government of Spain also, because we find that Government giving orders to its subsidized company under its contractual relations with that company to cooperate with plaintiffs in the premises. Spain apparently believed that this Government was doing what in any view of
59 the case it contracted to do under the treaty in providing for all classes in a safe and comfortable way, as no claim was then made upon this Government to do more. None could have been made under the treaty as to the kind of accommodations extended by the United States after it appeared that the accommodations provided were reasonably comfortable and safe. The repatriation of women and children alone involved an expenditure of several hundred thousand dollars by this Government, and as the matter stands it seems just for it to end.

Assuredly plaintiffs ought not to expect a judgment in their favor for the part paid by Spain to the Compania Transatlantica for coming into the matter to make more easy the journey to the peninsula for the women and children. In no event are plaintiffs entitled to anything for the service performed by others and paid for by Spain with neither compulsion nor request.

Under the construction we have given to this part of the agreement all children must be paid for at the uniform rate fixed for enlisted men and other persons. The amounts paid in settlement by some of the shipments were for minors at the rate of $36.87½ each. By these settlements it appears that two minor children were treated as one person. Plaintiffs are entitled to collect the round rate fixed for all persons other than officers as above stated, irrespective of the first settlements. These settlements had their origin in the presentation of accounts for transportation on those shipments made in advance of any written agreement under the treaty. The findings show that these accounts were presented on the five shipments pursuant to the oral agreement, and the question of compensation for those persons transported before the written contract was left open to be settled when the United States was prepared to ask for tenders. The first shipments were to be paid for on the written contract, which was expected to be made and which in point of fact was made. So, the written contract under the treaty fixed the rate payable for all persons transported under the oral agreement. Plaintiffs may have expected the written agreement to conform to their ideas of what should be paid for all the service, but as they entered into a

written contract which defined the rate there must be an application of the rate agreed upon for all persons repatriated.

Another question has arisen relating to the number transported on the last fifteen shipments. This dispute relates to the passages for 198 persons, some on the basis fixed for officers and some at the rate provided for the tranportation of enlisted men.

Masters of vessels certified to the landing of so many persons on many vessels, for which accounts were presented and paid without question. But this system was changed as to the last fifteen shipments, so that requests for transportation were required to be made and quartermasters' requisitions for transportation were certified to the carriers at the place of embarkation. No objections were offered at the time to the new method of computing the number of persons. The record does not disclose that any protest was offered at any time to the new plan. Plaintiffs now contend that unless the report of the American consul at Barcelona, in Spain (who must have obtained his information from the vessel masters as to the number landed at home), be accepted and paid for the carriers are hereby "made responsible for and held to perform the duty which the United
60 States had assumed in the treaty with Spain and which they had no power or authority to delegate "to others," thereby meaning that quartermasters' requisitions were an infringement on the rights of the carriers as measured by the treaty obligation.

But this obligation of the United States was to return at its own cost to Spain all prisoners released or caused to be released under the sixth article of the treaty. It nowhere appears that this obligation was violated. Neither does it appear that the United States demanded the transportation of persons outside of the requisitions. Secondly, it is objected that unless the report of the master of each vessel of the number landed at home be accepted the contract itself is violated. We do not think so. The contract provides that "an account of the number of officers, enlisted men, or other persons be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos & Co., and payment to the said company shall be made on the basis of the number of officers and enlisted men and persons counted on each ship."

Unless the means adopted to secure the integrity of the count so operated as to cause the carriers to repatriate prisoners not covered by the quartermasters' requisitions the contract is not violated. The proof is insufficient to show that, either at the time of the promulgation of the new requirement or during the shipments under the requisitions, the carriers undertook to transport or actually transported more prisoners than the number contained in the requisitions. The burden of proof rests upon them to show that the account of the number landed across the water included "prisoners" in excess of the official count at the place of embarkation. The onus is equally upon plaintiffs to show that when the official account came to be taken at the time of embarkation of the persons classed as prisoners Ceballos & Co. were deprived of the right to verify the requisitions at the starting point. It is not to be supposed that plaintiffs would receive 198 persons on board not en-

titled to transportation—some chargeable at the rate of $215 and others at the rate of $73.75 each—and take action only by sending from Spain a list not covered by the requisitions at Manila. The Government was not bound to depend upon the master's statement of the number carried or upon the statement of some one in Spain as to the number who appeared to have been carried, because that provision of the contract which required the prisoners to be designatel at the time of embarkation afforded that measure of protection which the Government was entitled to have under the contract and which must govern the number designated as prisoners. Why should plaintiffs neglect at the place of embarkation and against their interest that provision of the agreement which authorized their representative to count the number designated for transportation? The count was to be taken at the time of embarkation and the place for the count was where the prisoners embarked. (The advertisement called for place while the contract designated time.) That was to insure the repatriation of prisoners only, which was the thing, apparently, which plaintiffs now seek to evade. The requisitions of quartermasters were merely the means employed to attain certain ends—that is, the requisitions were introduced to determine who were
61 entitled to transportation where both parties to the agreement could see that no imposition was made the one upon the other. There is nothing inconsistent in the means employed to secure the proper execution of the agreement. Certainly there is nothing unfair disclosed, and without something more definite in the way of proof to establish injury to plaintiffs the transportation of the 198 persons alleged to have been carried outside of the requisitions can not be charged to the United States. Especially is this rule proper in view of the fact that many persons were carried to Spain who were not properly classed as prisoners of war and did not claim to be.

For the transportation of 160 other prisoners embarked in the first twenty-five sailings and not landed in Spain defendants urge that the contract has been broken by plaintiffs; and inasmuch as these have been paid for, the Government wants restitution, and counterclaims to the extent of $12,788.75.

It appears that 118 of the prisoners died on the passage, and 42 stopped on the way. The contract provides for all transportation to be due and payable upon evidence that the officers, enlisted men, or other persons were transported, subsisted, and delivered on shore in Spain. The number of be paid for is fixed by that other paragraph in the agreement which provides for an account of the number of prisoners embarking. The findings show that when the prisoners were delivered on board, some were ill. The shipments included wounded as well as sick persons.

We do not think that another and different mode of payment than that fixed by the contract at the place of embarkation ought now to be insisted upon, unless plaintiffs are clearly in fault. It would seem unjust, after the parties have agreed upon one basis of computing payment, for the Government to claim settlement by another method not in conformity with that part of the contract, unless plaintiffs are themselves responsible for neglect in performing their part of the agreement.

The rule of travel upon the high seas is that when a person dies on the passage he shall be buried at sea, and by this rule plaintiffs ought to recover for the persons designated to be carried, but who died on the passage. There is no proof of any steamship line furnishing accommodations and undertaking to transport people abroad and refunding passage money for those who die on the way. There may be such a rule somewhere, but the Government has not undertaken to show it. Without knowledge of such a provision in the ordinary contract of transportation this court will not undertake to deprive plaintiffs of their expenditures in this behalf.

As to those persons who stopped on the way, we do not accept plaintiffs' contention that the prisoners were under the control of the United States after their delivery aboard ship. Neither is this contention necessary to maintain their claim in this respect. Having provided means for the transportation of all such prisoners as were tendered, it would seem unreasonable to hold that it is incumbent on plaintiffs to show that they failed to land these persons in Spain. When the prisoners went on board the vessels designated to carry them they were there pursuant to the agreement. The prisoners were no more under the control of plaintiffs, except as passengers, than under duress on the part of the United States. If,
62 without the permission of the carriers, these persons got off, plaintiffs should not be held responsible.

Certain amounts representing payments for officers and men in excess of the number actually transported on one of the ships is set forth by the defendants by way of counterclaim. The amount of refund demanded is $9,721.25. The contention on this item grows out of the certificates of the masters of the vessels and the certificate of the quartermaster in charge of transportation matters at the place of embarkation. The findings show the proper deductions on the counterclaim.

Summarizing the matters in dispute, we find that a preliminary agreement in parol for the transportation of sick and wounded prisoners of war was made between plaintiffs and defendants after the surrender of the Spanish forces in the Philippine Islands, but before any contract under the treaty was made, and the plaintiffs performed services under the agreement for which they were rightfully paid for the five initial shipments; that the matter of compensation for these five initial shipments was, by verbal agreement between the parties, to be fixed by subsequent written agreement under the treaty of peace; that the written agreement made after the promulgation of the treaty established a rate of compensation applicable to all shipments of $215 for each civil, naval, and military officer, and $73.75 for all shipments of enlisted men and every other person treated as a prisoner by the United States, and that under the finding in this behalf plaintiffs were properly paid the amounts received on the first five shipments.

The conclusion follows that the counterclaim of $371,988.75 must be rejected. Next, that under the written contract, plaintiffs are entitled to collect on the whole account $215 for each officer, civil and military, and $73.75 for each enlisted man and every other person

treated as prisoners and transported as such. There results to plaintiffs the right to collect the full rate fixed for enlisted men and others for each child delivered as a prisoner to plaintiffs for transportation. That as to 198 persons not covered by quartermaster's requisitions, but claimed by plaintiffs to have been carried to Spain, nothing can be paid to plaintiffs, because they were not properly designated as prisoners or treated by the parties at the place of embarkation as persons entitled to passage at the expense of the United States; that as to 118 prisoners who died on the passage and 42 who stopped on the way plaintiffs are entitled to collect the rates fixed by the written contract, because the said plaintiffs are not responsible for the failure to deliver these persons on shore in Spain after the Government had imposed that duty upon them by delivery of these persons to the plaintiffs' steamships. It follows from this conclusion that the second counterclaim of $12,778.75 must be rejected; that there was an overpayment for certain military officers and certain enlisted men, in excess of the number of officers and men actually transported, of $9,721.25, and as to this amount the defendant'- third counterclaim is sustained.

The total number of prisoners delivered aboard plaintiffs' ships which were designated according to the contract at the place of embarkation to be transported in accordance with the agreement was
17,305, of whom 1,938 were military and civil officers and
63 15,367 were enlisted men and other persons treated as prisoners of war by the United States. Plaintiffs have been paid under the parol agreement and the written contract $1,544,595. Deducting the amount of the third counterclaim and allowing for all naval, military, and civil officers at the highest rate named in the contract, and for all enlisted men and other persons at the lowest rate named therein, the total amount which plaintiffs are entitled to have for their services is $1,549,986.25. The net result found due and unpaid from the United States to the plaintiffs for all the services is $5,391.25, for which judgment will be entered.

BY THE COURT.

64 VI.—*Final Judgment of the Court.*

No. 23689.

J. M. CEBALLOS AND COMPANY
vs.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 22d day of April A. D., 1907, judgment was ordered to be entered as follows:

The Court on due consideration of the premises, find that the amount due the claimants in this case was $1,549,986.25, and that the aggregate amount paid the claimants by the United States, including the allowance to defendants on their third counter-claim, is $1,544,595.00; and that upon the whole case there is still due the claimants, a balance of $5,393.25, and it is therefore ordered, ad-

judged and decreed that the claimants—J. M. Ceballos and Company, do have and recover of and from the United States the sum of Five Thousand Three Hundred and Ninety-three Dollars and twenty-five cents ($5,393.25).

BY THE COURT.

65 VII.—*Application for, and Allowance of, Appeal.*

No. 23689.

J. M. CEBALLOS & CO.
vs.
THE UNITED STATES.

From the judgment and decree rendered in the above entitled cause on the 22nd day of April, 1907, the petitioners, J. M. Ceballos and Company, by their Attorney, on the 21st day of May, 1907, make application for and give notice of an appeal to the Supreme Court of the United States.

JNO. J. HEMPHILL,
Attorney for Petitioners.

Ordered: That the foregoing application for appeal be allowed as prayed for.

STANTON J. PEELLE,
Chief Justice.

May 21, 1907.

66 Court of Claims.

No. 23689.

J. M. CEBALLOS AND COMPANY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of the Court; of the final judgment of the Court; of the application of the claimants for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I hereunto set my hand and affix the seal of said Court of Claims this 19 day of June A. D., 1907.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 20,763. Court of Claims. Term No. 108. J. M. Ceballos and Company, appellants, *vs.* The United States. Filed June 19, 1907. File No. 20,763.

[redacted]

Office Supreme Court, U. S.
FILED.
JAN 15 1909
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY,
Appellants,
vs.
THE UNITED STATES,
Appellee.
} No. 108.

APPEAL FROM THE COURT OF CLAIMS.

JOHN J. HEMPHILL,
Appellants' Attorney.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, *Appellants,*
vs.
THE UNITED STATES, *Appellee.*
No. 108.

APPEAL FROM THE COURT OF CLAIMS.

MOTION FOR ADDITIONAL FINDINGS BY THE COURT OF CLAIMS.

Come now the petitioners and move this Court for an order, as follows:

ORDERED: That the record in this case be remanded to the Court of Claims, and that said Court be instructed to find and certify to this Court, as matters of fact, in addition to the facts found and certified in said record—

First: Whether or not the United States entered into a contract with said J. M. Ceballos & Company, Appellants, for the repatriation of the Spanish prisoners of war held by

the United States in Cuba. If such contract was entered into, the said Court will insert a copy thereof in its Findings if the same appears in the record before said Court.

Second: Whether or not the families of Spanish officers taken as prisoners of war by the United States in Cuba were transported back to Spain by Ceballos & Company, the Appellants, and the rate at which said families, if so transported, were paid for by the United States.

Argument.

This case involves the liability of the United States to pay first class rates for first class accommodations furnished by the Appellants to the wives and children of civil and military officers, and other persons as prisoners of war in the Philippines and repatriated to Spain under a contract between the United States and Ceballos & Company, Appellants.

By the Treaty of Peace between the United States and Spain, made at Paris, December 10, 1898, it was stipulated in the first paragraph of Article 5 that:

> "The United States will, upon the signature of the present Treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article 6:

> " * * * The United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in *Cuba and the Philippines.*
>
> The Government of the United States will, at its

own cost, return to Spain * * * prisoners released or caused to be released by them, under this Article."

The United States entered into contracts with J. M. Ceballos & Company, the appellants, for the repatriation of the Cuban prisoners and of the Philippine prisoners held by the United States; both these contracts were made under and in accordance with the terms of the Treaty of Peace above quoted; the prisoners were repatriated from both countries in the vessels of the same company, those from Cuba being first carried back to Spain and payment made therefor by the United States. By reason of the large number of prisoners in the Philippine Islands taken and held by the United States authorities, and on account of the dreadful physical condition in which said prisoners were found when captured, and by reason of the disease and pestilence that prevailed amongst them, an emergency existed which required the United States to call upon Ceballos & Company for the repatriation of said Philippine prisiners before a formal contract could be advertised for and executed by the parties. A very large number of the prisoners were carried under these conditions.

When the testimony was being taken in this case the appellants introduced in evidence the Cuban contract and established by competent testimony the fact that the wives and children of officers were carried in the vessels of Ceballos & Company from Cuba to Spain as first class passengers and that the United States had allowed and paid for such transportation first class rates. In transporting the Philippine prisoners Ceballos & Co. again furnished first class accommodations for the wives and children of officers but in this case the United States has refused payment at first class rates and paid only third class, thereby entailing a heavy loss on appellants.

Appellants claim, and respectfully insist, that it is absolutely necessary for the full and proper presentation of their case on appeal that the Cuban contract and the rate of compensation allowed, and paid thereunder by the United States for the transportation of the wives and children of Spanish officers held as prisoners by the United States, should be embraced in the Findings of Fact and inserted in the Record on appeal.

A request for a Finding of both these important facts was made and filed with the Court of Claims at the proper time and in the regular way by the attorney for the petitioners and a reference made to the page of the Record (p. 247), where the Cuban contract is set out in full, and also to p. 37, where the rate paid by the United States for the transportation of the wives and children of Spanish officers under said contract is set out.

JOHN J. HEMPHILL,
Appellants' Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, APPELLANTS,
v.
THE UNITED STATES, APPELLEE.
No. 108.

SUGGESTIONS OF THE DEFENDANT IN OPPOSITION TO APPELLANTS' "MOTION FOR ADDITIONAL FINDINGS BY THE COURT OF CLAIMS."

The court is requested by appellants to remand the record in this case to the Court of Claims, and that said court be instructed in effect to make additional findings of fact. The defendant objects for the following reasons:

First. The record before this court fails to show that the appellants made any request to the Court of Claims to make the findings, or either of them, as set forth in their motion herein.

Second. The record fails to show that appellants filed any motion in the Court of Claims for a new trial, or that they made an application to said court to amend its findings or to make additional findings.

Third. The record fails to show due diligence on the part of appellants in filing the motion herein.

68338—09

Fourth. The additional findings which appellants seek to have the Court of Claims make and enter are immaterial to the consideration of the case by this court, and could have no bearing upon the final result.

ARGUMENT.

I.

Rules IV and V of this court relating to appeals from the Court of Claims read as follows:

> RULE IV. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.
>
> RULE V. In every such case, each party, at such time before trial and in such form as the court may prescribe. shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact.

The object of the fifth rule is to enable "either party to call for a finding upon a special question deemed material to the judgment in the case." (*Mahan* v. *The United States*, 11 Wall., 109; *United States* v. *Driscoll*, 131 U. S., App. CLIX; s. c. Book 24, L. C. P. Co., p. 596.)

At the time, however, that the decision in each of the above cases was rendered rule five read as follows:

> In all such cases either party, on or before the hearing of the cause, may submit to the

> court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal, to this court. (See *Mahan* v. *The United States*, *supra*, 110, 111.)

In commenting upon the rule above quoted, Mr. Justice Miller in the Mahan case, among other things, said (p. 112):

> The rule does not say that if the Court of Claims refuses to find as prayed, the prayer and refusal must be made a part of the record. The remedial purpose of this rule is that when a party has, in writing, indicated a specific question of fact on which he desires the Court of Claims to make a finding, and the court has neglected or refused to do so, this court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding.

Assuming that the present rule 5 was intended to afford the same remedial purpose as former rule 5, the appellants here are not entitled to invoke it for the reason that they did not, so far as the record before the court shows, submit to the Court of Claims a request for the findings which they now ask this court to require of the Court of Claims.

II.

Opportunity is afforded to either party in the Court of Claims to file a motion for a new trial, and in regard to motion for a new trial rules 107, 108, and 109 read as follows:

> 107. A motion for a new trial, other than under Revised Statutes, section 1088, must be founded upon one or more of the following grounds: First, error of fact; second, error of law; and third, newly discovered evidence. It must be made at the term in which the judgment is rendered.
>
> 108. A motion founded upon an error of fact must specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is relied on to support the motion.
>
> 109. A motion founded upon error of law must specify with like minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion.

If the appellants felt themselves aggrieved by the failure of the Court of Claims to make the finding which is now requested, they had ample opportunity to present the matter, and not having done so, they should not now, without good cause, be permitted to bring the matter to this court.

III.

Final judgment was rendered by the Court of Claims April 22, 1907. (See Record, p. 51.) The printed transcript of the record was filed in this court June 19, 1907.

It is thus seen that the appellants have not used due diligence in the matter now complained of by them.

IV.

Appellants' claim was founded upon a contract in which they agreed "to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish them subsistence while en route and on board the ships, and to deliver them on shore in Spain." (See Record, pp. 17, 18.)

The findings which appellants now request the Court of Claims to make are in regard to an entirely different contract between the Government and appellants. It is not claimed in the motion that the two contracts are to be construed as one instrument or that either one is dependent upon the other.

Respectfully submitted.

JOHN Q. THOMPSON,
Assistant Attorney-General.

O